Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

DEL ORO HILLS,

Petitioner,

v.

CITY OF OCEANSIDE,

Respondent.

Petition For Writ Of Certiorari To The California Court Of Appeal, Fourth Appellate District, Division One

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a property owner, damaged by a regulation which fails to substantially advance legitimate state interests, must also show that the regulation denies the owner all economically viable use of its property in order to establish a regulatory taking under the Fifth Amendment.

2. Whether a city's growth control ordinance, found invalid for conflict with that city's own general plan and conflict with three separate state statutes designed to implement important statewide interests, can be found to "substantially advance legitimate state interests."

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 6

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT ON THE LAW OF REGULATORY TAKINGS 6

II. THE CALIFORNIA DECISION THREATENS A PILLAR OF THIS COURT'S FORMULATION FOR REGULATORY TAKINGS, AND THIS CASE PRESENTS AN IMPORTANT OPPORTUNITY FOR THE COURT TO REAFFIRM THE INDEPENDENCE OF THE FIRST OF THE TWO PRONGS OF THE REGULATORY TAKINGS TEST, AND TO FURTHER DEFINE THE "SUBSTANTIALLY ADVANCES A LEGITIMATE STATE INTEREST" PRONG 10

A. The Conflict Between the Decision in This Case and This Court's Takings Decisions Endanger One Prong of the Well-Established Test For Regulatory Takings, and Review of the Decisions is Necessary to Reaffirm the Integrity of This Court's Regulatory Takings Formulation 10

B. This Case Presents a Unique Opportunity for This Court to Further Define the "Substantially Advances a Legitimate State Interest" Prong 12

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Agins v. City of Tiburon, 447 U.S. 255 (1980) ..... *passim*

Auto Equity Sales, Inc. v. Superior Court, 57 Cal.2d 450 (1962) 10

Blue Jeans Equities West v. City & County of San Francisco, 3 Cal.App.4th 164 (1992) 12

Building Industry Association of San Diego v. Superior Court, 211 Cal.App.3d 277, *rev. den.* Aug. 17, 1989 (1989) 6

Building Industry Association of San Diego, Inc. v. City of Oceanside, 27 Cal.App.4th 744, rev. den. October 13, 1994 (1994) 5

City of Del Mar v. City of San Diego, 133 Cal.App.3d 401 (1982) 14

Commercial Builders of Northern California v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991), *cert. den.* ___ U.S. ___ [112 S.Ct. 1997] (1992) 12, 13

Del Oro Hills v. City of Oceanside, 31 Cal.App.4th 1060 (1995) 1, 6

DiGenova v. State Board of Education, 57 Cal.2d 167 (1962) 11

Dolan v. City of Tigard, 512 U.S. ___ [114 S.Ct. 2309] (1994) 8, 9, 13

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) ...11, 13

Lucas v. South Carolina Coastal Council, 505 U.S. ___ [112 S.Ct. 2886] (1992) 9, 13

Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977) 17

TABLE OF AUTHORITIES – Continued

Page

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) ..... *passim*

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 7

The Adamson Companies v. City of Malibu, 854 F.Supp. 1476 (D.C. Cal. Central Dist. 1994) 13

Yee v. City of Escondido, 503 U.S. 519 (1992) 8, 9

STATUTE

28 United States Code Section 1257 2

UNITED STATES CONSTITUTION

Fifth Amendment 11

CALIFORNIA STATUTES

Evidence Code

Section 669.5 .....15, 16

Government Code

Section 65008 15

Section 65302.8 15

Section 65863.6 15

Section 65913 15

Section 65913.1 15

Section 65915 15

Health & Safety Code

Section 50001 15

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PETITION FOR WRIT OF CERTIORARI

DEL ORO HILLS respectfully petitions for a writ of certiorari to review the published opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division One, in this case.

OPINIONS BELOW

The opinion of the Court of Appeal (Appendix A, *infra*) is reported at 31 Cal.App.4th 1060.

JURISDICTION

The opinion of the Court of Appeal of California, Fourth Appellate District, Division One, was entered on January 23, 1995. On April 20, 1995, the Supreme Court of California denied a petition for hearing (Appendix C). The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(a).

STATEMENT OF THE CASE

In 1987, the voters of the City of Oceanside ("CITY") adopted an initiative growth control ordinance ("Prop. A"), which capped building permits at 800 per year after the first year, exempted, among other types of projects, large-lot single-family houses and low income/senior housing (except units built with density bonuses or other development considerations), and subjected applicants for the permits allocated under the cap to an evaluation system wherein "points" were to be earned by satisfying public facilities needs (the "A" List) and providing architectural enhancements or other amenities (the "B" List).

DEL ORO HILLS ("DEL ORO"), a partnership, owned 300 acres in the CITY which was the subject of an approved Specific Plan and "Master Tentative Subdivision Map" for a project called "Del Oro Hills." The Master Subdivision Map was intended to allow the owner of the property to sell off parcels of its land much more quickly than those in conventional subdivisions, and to convey very large lots, called "Villages," which were not themselves building sites, to other builders and developers, who would then file additional subdivision maps

for approval of specific development plans and, ultimately, seek issuance of building permits for actual housing construction. Project build-out was originally intended to be over five (5) years.

As the *quid pro quo* for approving the Master Subdivision Map and allowing early conveyance of the Villages, CITY required that installation of all subdivision improvements be accelerated, compared to the phasing of construction involved in conventional subdivisions.

On December 11, 1985, DEL ORO obtained a construction loan of $19,700,000, and a few months later entered into a contract for grading and installation of storm drains, sewer, water, utilities, curbs, gutters, sidewalks, and street improvements.

Before Prop. A qualified for the ballot, DEL ORO's properties had sold very well and very easily, and DEL ORO was generally able to receive the asking price for all the Villages. Demand for the Villages was excellent. At one time or other, each of the Villages was in escrow to be sold, but some fell out of escrow for various reasons. When Prop. A was adopted, four Villages had to be resold.

When Prop. A passed on April 21, 1987, DEL ORO and the personal guarantors of the construction loan faced imminent financial disaster. As of April 30, 1987, a few days after the election in which Prop. A passed, DEL ORO had actually spent $19,012,807 in subdivision improvement costs. Costs of grading and improvements had increased (by the end of November, 1986, DEL ORO had projected total costs of $26,179,809), and the $19.7 Million construction loan was insufficient to pay for all

improvements. The only way to repay the loan and pay the excess costs was to continue work and complete all the subdivision improvements in order to fulfill the requirements for closing the escrows, and to sell every Village as soon as it could for as much as it could.

Since the proposal of Prop. A, it had become practically impossible to market the unsold property, and that impossibility became fixed with the adoption of Prop. A. After the adoption of Prop. A, DEL ORO requested an exemption from Prop. A, but CITY refused the request.

Lacking any other buyers, DEL ORO, with the approval of its lender, sold the remaining four Villages to one of DEL ORO's constituent partners, Robinhood Homes, Inc. at a lender-dictated price, which was $1.5 Million less than the price of an agreement to sell the property which had been reached before Prop. A came on the scene.

Certain disputes arose with some buyers, but DEL ORO had to make concessions of over $700,000 in order to keep the escrows alive after Prop. A passed.

All the escrows closed within the originally anticipated two-year period. Within three and one-half years, DEL ORO's buyers had obtained building permits for all 1,200 units.

DEL ORO, other private developers, and the Building Industry Association of San Diego, Inc. ("BIA") brought suit to challenge Prop. A. DEL ORO also sued for damages from CITY's continued enforcement of Prop. A against DEL ORO's property. Other developers dropped

out, and DEL ORO and BIA proceeded to a consolidated trial on the validity of Prop. A.

The trial court found that Prop. A represented a reasonable accommodation of competing interests and that there were no conflicts between Prop. A and local or state law. The trial court entered judgment in favor of CITY on the issue of Prop. A's validity.

In DEL ORO's separate case, the trial court granted summary judgment to CITY, denying all of DEL ORO's damages claims and ruling that, since Prop. A was valid and did not on its face deprive DEL ORO of all reasonable use of DEL ORO's property, no unconstitutional taking had occurred.

DEL ORO and BIA appealed, and their cases were consolidated through oral argument. On July 19, 1994, in the consolidated appeal on the validity of Prop. A, the California Court of Appeal, Fourth Appellate District, Division One, reversed the trial court, ruling that: "Prop. A [is] facially in conflict with the PFME [an element of City's general plan] and with state law, . . . and . . . as applied, Prop. A remained in conflict with those provisions. . . . " and was invalid *ab initio*. (See Appendix B, p. B-20.)[1] On remittitur in the BIA case, the trial court

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[1] The decision is contained in Appendix B (*Building Industry Association of San Diego, Inc. v. City of Oceanside*, 27 Cal.App.4th 744, *rev. den.* October 13, 1994 (1994)). In the instant decision, and herein, it is referred to as "*Building Industry II*" to distinguish it from an earlier decision in the same case on a BIA/DEL ORO writ of mandate to review a denial of a BIA/

vacated its previous judgment and entered a new judgment in favor of BIA.

The DEL ORO appeal continued, and on January 23, 1995, the Court of Appeal, notwithstanding its previous finding of the invalidity of Prop. A, upheld the summary judgment in favor of CITY. (Appendix A.) DEL ORO petitioned for review by the California Supreme Court. On April 20, 1995, the Supreme Court denied DEL ORO's petition without an opinion. (Appendix C.) The California Supreme Court also refused a request to de-certify the opinion for publication. The decision is now published at 31 Cal.App.4th 1060.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT ON THE LAW OF REGULATORY TAKINGS.

Prop. A was invalid for conflict with CITY's General Plan, which by state law is a city's perception of its own general welfare, and with important statewide interests in affordable housing. Thus, DEL ORO argued that Prop. A failed to substantially advance legitimate state interests, and that, under the first prong of the test in *Agins v. City of Tiburon*, 447 U.S. 255 (1980) [hereinafter "*Agins*"], a *per se* regulatory taking had occurred.

DEL ORO summary judgment motion. (*Building Industry Association of San Diego v. Superior Court*, 211 Cal.App.3d 277, *rev. den.* Aug. 17, 1989 (1989)).

To this argument, the Court of Appeal responded:

> "[W]e cannot accept Del Oro's theory that satisfaction of one element of the *Agins* test (i.e., that there was an invalid regulation) is enough to establish a taking as a matter of law. In *Nollan, Lucas,* and *Dolan,* the United States Supreme Court's analysis of the taking issue inextricably interlinked both the regulation's validity and the question of whether any economically beneficial use of the property remained in light of the regulation. In light of later authority, *Agins* did not establish an 'either/or' type of test." (Appendix A, p. A-27.)

The Court of Appeal upheld the summary judgment in favor of CITY, because "[D]el Oro [could] not show any facial invalidity of the ordinance due to any deprivation of all economically beneficial use of the property." (Appendix A, p. A-30.)

This holding directly conflicts with this Court's well-established "two prong" test for regulatory takings. While this Court originally defined a regulatory taking simply as the point where a regulation goes "too far" (*Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922)), the current test is that formulated in *Agins*:

> "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, [citation omitted], or denies an owner economically viable use of his land, [citation omitted]." (447 U.S. at 260.)

This "two-prong" test has been repeated countless times by state and federal courts. In *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987) [hereinafter

"Nollan"], this Court articulated the standard in the negative and conjunctive form: " . . . land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land,' [citing *Agins*]." (483 U.S. at 834.) This Court's more recent decision in *Dolan v. City of Tigard*, 512 U.S. ___ [114 S.Ct. 2309] (1994) [hereinafter *"Dolan"*] repeated the *Agins* test, also in a negative and conjunctive manner. (114 S.Ct. at 2316.) However, this Court's decisions all say the same thing: a regulatory taking occurs *either* if the regulation does not substantially advance a legitimate state interest (the "not-substantially-advance" prong) *or* it denies an owner all economically viable use of his land (the "denies-all-use" prong). Of course, a municipality *avoids* a taking (i.e., shows a taking has *not* occurred) by negating *both* prongs – showing that the regulation substantially advances state interests *and* does *not* deny all use. Hence the negative/conjunctive grammatical structure of the formulation in the *Nollan* and *Dolan* decisions.

Regardless of the grammatical structure chosen to express the taking test, nothing in this Court's decisions even hints that the rule is anything other than that an unconstitutional taking occurs if *either* of the two elements mentioned in the *Agins* formulation are present. This Court's decisions have explicitly recognized the independence of the two prongs of the *Agins* test. Most *apropos* to this case, in *Yee v. City of Escondido*, 503 U.S. 519 (1992) [hereinafter *"Yee"*], this Court expressly recognized the independence of the first prong, stating that an allegation that an ordinance does not substantially advance legitimate state interests "does not depend on the extent

to which petitioners are deprived of the economic use of their particular pieces of property." Hence, the *Agins* test is properly described as an "either/or" test.

The California Court of Appeal specifically rejected the "either/or" formulation, and, contrary to *Yee*, insisted that DEL ORO satisfy both prongs of the *Agins* analysis in order to establish a regulatory taking. Moreover, the California Court of Appeal's description of the takings analysis in *Nollan*, *Lucas*[2], and *Dolan* is seriously flawed.

In *Nollan* and *Dolan*, both "unconstitutional conditions" cases, the plaintiffs clearly were not deprived of all use of their properties. In *Dolan*, this Court expressly acknowledged that the petitioner "assuredly is able to derive some economic use from her property." (512 U.S. ___ [114 S.Ct. at 2316].) Even though the deprivations of use involved in *Nollan* and *Dolan* were not complete, this Court nonetheless found regulatory takings had occurred.

The *Lucas* decision established that if a regulation has sufficient impact ("denies-all-use"), no inquiry into the legitimacy of the regulation is necessary. Thus, it confirmed the independence of the second of the two "prongs" of the *Agins* test.

The California Court of Appeal asserted that this Court's analysis of the taking issue in *Nollan*, *Lucas* and *Dolan* has "inextricably interlinked both the regulation's validity and the question of whether any economically beneficial use of the property remained in light of the

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[2] *Lucas v. South Carolina Coastal Council*, 505 U.S. ___ [112 S.Ct. 2886, 2893] (1992) ["*Lucas*"].

regulation." (Appendix A, p. A-27.) This is plainly wrong. All three decisions establish that an owner can rest a taking challenge on the ground that the regulation does not substantially advance legitimate state interests, even in the absence of a complete deprivation of use.

The Court of Appeal's statement that, "[i]n light of later authority, *Agins* did not establish an 'either/or' type of test" is patently erroneous and should be corrected.

II. THE CALIFORNIA DECISION THREATENS A PILLAR OF THIS COURT'S FORMULATION FOR REGULATORY TAKINGS, AND THIS CASE PRESENTS AN IMPORTANT OPPORTUNITY FOR THE COURT TO REAFFIRM THE INDEPENDENCE OF THE FIRST OF THE TWO PRONGS OF THE REGULATORY TAKINGS TEST, AND TO FURTHER DEFINE THE "SUBSTANTIALLY ADVANCES A LEGITIMATE STATE INTEREST" PRONG.

A. The Conflict Between the Decision in This Case and This Court's Takings Decisions Endanger One Prong of the Well-Established Test For Regulatory Takings, and Review of the Decisions is Necessary to Reaffirm the Integrity of This Court's Regulatory Takings Formulation.

By reaffirming the lower court's decision to publish the case, the California Supreme Court made the decision binding on all the trial courts throughout California (*Auto Equity Sales, Inc. v. Superior Court*, 57 Cal.2d 450, 455 (1962)), and persuasive authority in the other appellate courts. By denying review of the decision of the lower appellate court, the California Supreme Court, while not

implicitly adopting it, gives it added significance in the state. (*DiGenova v. State Board of Education*, 57 Cal.2d 167, 178 (1962) ["[I]t does not follow that such a denial is without significance as to our views."])

More importantly, California is the most populous of the United States, the source of many leading land use cases, and other states look to California courts to find where the "cutting edge" of land use regulation lies.

That California courts tend to stretch the limits of governmental power over the use of land is evident from the California court opinions which led to the decisions in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) [hereinafter "*First English*"] and *Nollan*, wherein this Court had to correct California's views of the takings clause of the Fifth Amendment.

If other state courts emulate the California Court of Appeal decision, which states a rule manifestly in conflict with this Court's formulation of the test for regulatory takings, it will sow chaos and confusion among property owners and governmental entities throughout the United States. More importantly, it will endanger one of the two pillars of the takings test articulated by this Court: that a taking can occur where a regulation fails to substantially advance a legitimate state interest.

B. This Case Presents a Unique Opportunity for This Court to Further Define the "Substantially Advances a Legitimate State Interest" Prong.

Because Prop. A violated CITY's own General Plan, which by state law embodies a city's perception of the "general welfare," and flew in the face of important statewide interests in affordable housing, DEL ORO argued that Prop. A, by definition, did not "substantially advance legitimate state interests." To this argument, the Court of Appeal responded:

> "Although we found in our BIA opinion that Prop. A could not stand because it was in conflict with the City's general plan and statutory provisions, we do not find that conclusion mandates a finding here that Prop. A also violates constitutional rights so as to constitute a per se taking of private property." (Appendix A, pp. A-2 to A-3.)

In *Nollan*, this Court established that the "substantially advances" standard is more stringent than the "reasonably related" due process standard. (483 U.S. at 834, n. 3.)[3] However, this Court has not further defined the

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[3] The Ninth Circuit has rejected the idea that the *Nollan* decision created a more stringent standard of legitimacy for regulatory takings that did not involve actual physical taking of land (*Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), *cert. den.*, ___ U.S. ___ [112 S.Ct. 1997] (1992)), and one California court has followed that view. (*Blue Jeans Equities West v. City & County of San Francisco*, 3 Cal.App.4th 164, 171 (1992).) However, *Commercial Builders'* view is not unanimously accepted in the federal courts. "Commercial Builders held that the 'substantially advances' test does not require scrutiny any stricter than rational basis. This Court

parameters for determining when a regulation fails the "substantially advances" test.

Since land use regulations are routinely held to be valid exercises of the police power, property owners damaged by them invariably seek to bring their takings actions within the "denies-all-use" prong of the *Agins* formulation. The *First English* decision made clear that the Constitution demands monetary relief for the period during which the property owner is deprived all use of its property. In *Nollan* and *Dolan*, this Court decided that certain conditions of development approvals failed to substantially advance legitimate governmental interests, because there was insufficient nexus between the interests and the conditions. The *Lucas* decision affirmed the independence of the "denies-all-use" prong.

However, this Court has not had the occasion to examine, in a takings context, a regulation which has been found invalid in its entirety because it conflicted with both local and statewide interests of major importance. This case presents just such an opportunity, involving an ordinance which can hardly be justified under a substantive due process standard, no less under the "substantially-advances-state-interests" test.

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doubts that the Supreme Court meant 'rationally related' when it wrote 'substantially advance,' but because the rent control ordinance passes both tests, the Court need not consider the issue further." (*The Adamson Companies v. City of Malibu*, 854 F.Supp. 1476 (D.C. Cal. Central Dist. 1994) [94 Daily Journal D.A.R. 9158, 9174].) This petitioner agrees that the *Commercial Builders* decision does not comport with this Court's decision in *Nollan*.

First, the conflict which the Court of Appeal found between Prop. A and CITY's General Plan was not a mere technical infirmity. Under California law, a general plan is directly relevant in determining whether a regulation bears a real and substantial relationship to the general welfare of the municipality (which, in light of the *Nollan* decision, is a more easily satisfied standard necessarily subsumed within the "substantially-advances-state-interests" test). In *City of Del Mar v. City of San Diego,* 133 Cal.App.3d 401, 414-15 (1982), the California Court of Appeal stated that:

> " . . . a city's general plan may be viewed in many ways as the city's articulated perceptions of what constitutes the locale's 'general welfare.' "

And that an

> " . . . inconsistency [between a zoning ordinance and the general plan] must at least give rise to a presumption that the zoning ordinance does not reasonably relate to the community's general welfare, and therefore constitutes an abuse of the city's police power."

Thus, conflict with a general plan negates any police power justification and equates with a violation of substantive due process. If an ordinance cannot pass through the substantive due process filter, it surely cannot pass the more tightly-drawn "substantially-advance-legitimate-state-interests" test.

Second, the three statutes with which Prop. A conflicted (California Government Code § 65008, subd. (c),[4] prohibiting discrimination against housing affordable by low, moderate or middle-income families; § 65913.1, requiring that zoning standards contribute to the economic feasibility of producing the lowest-cost housing; and § 65915, establishing density bonuses for lower income housing) all reflect strong statewide interests in affordable housing and a legislative intent to reign in growth control measures which unduly interfere with the paramount policy to ensure a decent home for every California family. (See Health & Safety Code § 50001.)

Third, Prop. A was a type of growth control measure on which the California Legislature had cast a very skeptical eye, because of its threats to statewide interests. In 1980, the Legislature recognized a crisis in the declining affordability of housing and found that costs of new housing development had been increased, in part, by land use regulations themselves. (§ 65913.) It singled out annual limits on building permits ("permit caps") for special legislative attention. Three different statutes required that cities take extraordinary measures to justify permit caps (§§ 65302.8 and 65863.6, and Evidence Code § 669.5). One can only conclude from this ferment of anti-cap laws that the Legislature: (1) believed permit caps were particularly pernicious to the state's interests in affordable housing, and (2) wanted to make it particularly difficult for cities to adopt permit caps.

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[4] All further statutory references are to the California Codes, and unless otherwise identified, to the Government Code.

Fourth, Prop. A was presumed to be unconstitutional, and the evidence supported the presumption. This case was tried under the rubric of one of the anti-cap statutes: Evidence Code section 669.5. Since Prop. A was a permit cap, it was presumed to adversely affect the supply of housing in the region. (Evid. Code § 669.5, subd. (a).) The trial court explicitly found that CITY failed to rebut that presumption. Section 669.5 also placed the burden of proof on CITY to show how Prop. A was "necessary for the protection of the public health, safety, or welfare of [the citizens of Oceanside]." (Evid. Code § 669.5, subd. (b).) Thus, unlike other regulatory ordinances, it enjoyed no presumption of constitutionality.[5]

The trial court ruled that the Evidence Code section 669.5 burden was nothing more than the "reasonable relationship" standard, and held that Prop. A had satisfied it. The Court of Appeal declined to review that portion of the opinion, because the findings of conflict were sufficient to resolve the case.

However, the trial court's own factual findings had stripped Prop. A of virtually all its arguable remaining legitimacy. Nearly every "public welfare" justification which CITY asserted in defense of Prop. A was successfully rebutted by DEL ORO. For example, in response

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[5] CITY's own counsel in this case had opined that: "This shift in the burden of proof [in Evid. Code § 669.5] *appears to eliminate the presumption of constitutionality* previously accorded by the courts for these types of growth restrictions. [Emphasis added.]" (Katherine E. Stone, "A Legislative Mandate for More Housing," *Los Angeles Lawyer*, July-Aug. 1983, p. 36.)

to CITY's assertion that, by the time Prop. A was passed, infrastructure deficiencies were "glaring," the court reviewed the evidence and concluded that:

> *"BIA has certainly inflicted substantial damage to the City's case of present infrastructure problems when Prop. A was passed.* [Emphasis added.]" (Statement of Decision and Order [Phase II Trial in BIA/DEL ORO consolidated validity case], Appendix D, p. D-2.)

More importantly, the CITY's own Planning Director admitted that the growth which had occurred in the years before Prop. A was adopted was not affecting the health, safety and welfare of Oceanside to a significant degree, that services were properly and effectively staged in a manner which would not over-extend facilities, and that Oceanside was not experiencing runaway growth. (Excerpts from Reporter's Trial Transcript [Phase II Trial in BIA/DEL ORO consolidated validity case], Appendix E.)

Finally, Prop. A, a purported growth control ordinance, did not control growth. Prop. A was designed to replicate, not reduce, the historic rate of building permit issuance. More permits were issued under Prop. A each year (through trial) than had been issued in any of the ten years before Prop. A was adopted. (Appendix D, pp. D-3 to D-5.)

To satisfy even a substantive due process challenge, an ordinance must not only serve a legitimate purpose, but the means employed must be rationally related to the legitimate purpose. (*Moore v. City of East Cleveland, Ohio,*

431 U.S. 494, 498, n. 6. (1977)) To satisfy the "substantially-advances-state-interests" test, an ordinance certainly must prove no less. A growth control measure that is not needed to cure problems of growth, because no problems of growth existed to any substantial degree, and which does not in fact control growth, is by definition one not reasonably related to the purpose of growth control and one which does not "substantially advance" the interests usually asserted to justify growth control measures.

Admittedly, few land use regulations get the kind of scrutiny Prop. A received in this case, and undoubtedly that is why most regulations are routinely upheld. However, this case began with the opposite of the usual presumption of constitutionality, and, under the closer scrutiny which state law required during trial, Prop. A proved to be woefully ineffectual in serving any police power purpose remaining after the withering BIA/DEL ORO attack on its *raison d'etre*.

All things considered, Prop. A cannot be shown to even "reasonably relate" to the public welfare, never mind "substantially advance" legitimate state interests. To the contrary, it flew in the face of important policies in the state's zoning and planning law, to which CITY zoning was supposed to be subservient, and violated CITY's own General Plan, which is supposed to be an articulation of CITY's view of the public welfare. As a police power measure, Prop. A was patently unconstitutional. The Court of Appeal committed a serious error in finding that, in spite of Prop. A's invalidity, CITY's continued enforcement of Prop. A against DEL ORO nonetheless did

not result in a per se taking under the "first prong" of the *Agins* test.

If a plaintiff must prove denial of all use of its property to prove a regulatory taking resulting from enforcement of an invalid ordinance, the first prong of the *Agins* test will no longer exist as an independent prong, contrary to all of this Court's decisions. If a California decision is allowed to stand which finds that an ordinance so deficient in the normal police power justifications can nonetheless satisfy the "substantially advances" prong of *Agins*, then the first prong of the *Agins* test will be rendered meaningless.

It is crucially important for this Court to review the California Court of Appeal decision in order to protect the body of taking law which this Court has so carefully crafted.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DEL ORO HILLS, Plaintiff and Appellant, v. CITY OF OCEANSIDE, Defendant and Respondent.	D017139 Super. Ct. No. N37196 (Filed Jan. 23, 1995)

APPEAL from a judgment of the Superior Court of San Diego County, Herbert B. Hoffman, Judge. Affirmed.

Worley, Schwartz, Garfield & Rice and Donald R. Worley for Plaintiff and Appellant.

Myers, Widder & Gibson, Freilich, Stone, Leitner & Carlisle, Katherine E. Stone, J. Roger Myers and Brown, Diven & Hentschke, Brown, Harper, Burns & Hentschke, Daniel S. Hentschke, City Attorney, for Defendant and Respondent.

Christi Hogan, City Attorney (Malibu) as Amicus Curiae.

The initial questions posed by this appeal as to the validity of a residential growth control initiative, Chapter 32A of the City of Oceanside Municipal Code, commonly known as Proposition A (Prop. A), adopted by the voters of the respondent City of Oceanside (the City), were

answered by this court in our opinion filed July 19, 1994 in *Building Industry Assn.* (also referred to as BIA) *v. City of Oceanside* (1994) 27 Cal.App.4th 744 (hereafter *Building Industry II* or the BIA opinion). In the BIA matter, with which this case was consolidated, the City obtained judgment in its favor in a three-phase court trial on BIA's complaint as to the validity of Prop. A. We reversed that judgment because under the standards set by *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531 (*Lesher*), Prop. A is facially and as applied in conflict with the City's general plan and with state planning and zoning law. (Gov. Code, § 65000 et seq.)[1] We thus found that initiative measure invalid from its adoption date.

This appeal by Del Oro Hills, a partnership (Del Oro), of summary adjudication and judgment entered against it in its companion and consolidated action against the City, raises additional questions as to the viability of its claims for damages in light of the constitutional prohibition against governmental regulatory takings without just compensation. Del Oro also claimed breach of an implied-in-fact agreement with the City not to interfere with the timing of its development, violation of its vested rights to proceed with development, and denial of equal protection of the law due to the City's exemption from Prop. A of an allegedly similarly situated developer.

Although we found in our BIA opinion that Prop. A could not stand because it was in conflict with the City's

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[1] All statutory references are to the Government Code unless otherwise specified.

general plan and statutory provisions, we do not find that conclusion mandates a finding here that Prop. A also violates constitutional rights so as to constitute a per se taking of private property. Instead, we conclude that Del Oro has failed to show Prop. A promotes no legitimate state purpose and would thus be facially invalid under takings standards. In addition, Del Oro has failed to show any valid "as-applied" challenge to Prop. A because it did not exhaust administrative remedies to obtain a final determination on a specific development plan. The other issues raised by Del Oro (equal protection violations and impairment of implied contract or vested rights) are also unmeritorious. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Because Del Oro's action was consolidated with the BIA action for trial of the issues on the validity of Prop. A, an understanding of the BIA proceedings is necessary for an analysis of Del Oro's contentions on this appeal. We therefore quote from our BIA opinion, which in turn quotes from a prior opinion of this court (*Building Industry Assn. v. Superior Court* (1989) 211 Cal.App.3d 277 [hereafter *Building Industry I* or the prior opinion]), which arose out of our review of an order denying cross-summary judgment/adjudication motions in the BIA matter:

1. History of Prop. A

"Our [*Building Industry I*] opinion contains the following summary of the adoption and content of Prop. A, alternatively referred to as Chapter 32A:

" 'Ch. 32A, adopted by the Oceanside electorate in April 1987, declares one of its purposes is "to augment the policies of the City as recorded in the General Plan and City ordinances relating to the regulation of residential development," and "[i]n order to accomplish this purpose, the City must be able to control the rate, distribution, quality and economic level of proposed development on a year to year basis." Ch. 32A adopts a "Residential Development Control System" (RDCS) which, with what may be significant exceptions, adopts a maximum number of dwelling units to be constructed each year, called annual allotments. The allotments are 1,000 for 1987 and 800 for each year thereafter until December 31, 1999, with power granted to the City Council to modify the annual allotment by an amount no greater than 10 percent more or less for any given year and a requirement the annual allotment for a next succeeding year be adjusted higher or lower in order to redress any excess or deficit in the preceding year. Excepted from the RDCS are the following: "(a) Projects of not more than four residential dwellings, limited to only one such project per developer per calendar year.

" ' "(b) Fourplexes or less numbered multiple dwellings on a single existing lot.

" ' "(c) Single family residential units on a single existing lot.

" ' "(d) Rehabilitation or remodeling of an existing dwelling, or conversion of apartments to condominiums, so long as no additional dwelling units are created.

" ' "(e) Units within the legally designated redevelopment project area.

" ' "(f) Those specific Units which are formally dedicated for occupancy by low income persons or senior citizens pursuant to the provisions of applicable federal, state, or local laws or programs provided these types of units are spread equitably throughout the city and not concentrated in one neighborhood. For the purposes of this section, a project is funded or subsidized pursuant to applicable federal, state or local laws or programs if it receives a loan, grant or continuing financial subsidy for the purpose of developing low-income or senior citizen housing units. This section does not exempt low income or senior citizen projects built with density bonuses or other development considerations under any program.

" ' "(g) Single family dwelling unit projects with lots an average of which are 10,000 square feet or better, which can achieve a minimum of 70% or better, of the maximum awardable points using the Residential Development Evaluation System are exempt."

" 'Ch. 32A, in addition, provides for application, evaluation and award of development allotments which must be granted before a building permit may be issued.' (*Building Industry [I], supra,* 211 Cal.App.3d at pp. 285-286.)

"Under Prop. A, projects are reviewed by a 'Residential Development Evaluation Board' (the Board) made up of members of the City's planning commission, who evaluate proposed projects for their impact upon public facilities and services (the 'A' criteria) and site and architectural quality (the 'B' criteria). A project which does not receive a score of 51 percent on the 'A' criteria and 70 percent on the 'B' criteria is eliminated from

consideration for an annual allocation. The Board's recommendations are forwarded to the City Council, which makes the annual allocations." (*Building Industry II, supra,* 27 Cal.App.4th at pp. 749-750, fn. omitted.)

2. BIA and Del Oro File their Actions

"Shortly after Prop. A was adopted, BIA and 10 developers [including Del Oro] sued the City under several theories contending Prop. A was invalid on its face, seeking declaratory and injunctive relief.[2] After the trial court denied cross-motions for summary judgment and summary adjudication, its order was upheld by this court in our prior opinion. We concluded that invalidity of a growth control ordinance 'can be established only by determining facts bearing on whether the enactment truly conflicts with state law and its purposes.' (*Building Industry [I], supra,* 211 Cal.App.3d at p. 290.) We stated that whether the regional housing needs as established by SANDAG will be met by the City was a question of material fact that awaited proof. (*Id.* at p. 293.) We explained that some factual determinations by the trial court would of necessity have to be projections of the reasonable probability of accommodating regional housing requirements in future housing periods. (*Id.* at p. 294.) We were unable to establish the validity of any of BIA's various asserted conflicts between Prop. A and state law 'without reference to established facts.' (*Ibid.*) We further

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[2] Nine of the ten developers dismissed their actions; Del Oro, the remaining one, pursued its action in consolidation with the BIA action. Appeal in another related action, *Cromwell Ranch v. City of Oceanside,* is pending in this court (D019020).

found that there was present no clear invalidity of Prop. A due to inconsistency with the City's general plan, on the basis that 'factual determinations need to be made before the question of inconsistency can be resolved.' (*Id.* at p. 297.)" (*Building Industry II, supra,* 27 Cal.App.3d at pp. 752-753, original fns. omitted.)

3. Consolidated Trial Proceedings

In accordance with the prior opinion, the trial court scheduled trial of the BIA lawsuit, and consolidated Del Oro issues, in three phases. Phase I addressed the issues raised by Evidence Code section 669.5, subdivision (a), as to whether the City had successfully rebutted the statutory presumption that Prop. A was "presumed to have an impact on the supply of residential units available in an area which includes territory outside the jurisdiction of the city, . . . " (Evid. Code, § 669.5, subd. (a).)[3] In phase II of the trial, under Evidence Code section 669.5, subdivision (b), the City had the burden of proof to show that Prop. A was "necessary for the protection of the public health, safety, or welfare of the population of the

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[3] In pertinent part, Evidence Code section 669.5, subdivision (a) reads: "Any ordinance enacted by the governing body of a city . . . which (1) directly limits, by number, the building permits that may be issued for residential construction or the buildable lots that may be developed for residential purposes, or (2) changes the standards of residential development on vacant land so that the governing body's zoning is rendered in violation of Section 65913.1 of the Government Code is presumed to have an impact on the supply of residential units available in an area which includes territory outside the jurisdiction of the city. . . . "

[C]ity, . . . " (*Ibid.*) The court set forth as the appropriate "balancing test" for phase II:

> " 'The City has the burden of proof by the preponderance of the evidence that (1) there are real and substantial "problems relating to its police power to protect public health, safety and welfare of its population" (either present or reasonably anticipated), and (2) that the ordinance or initiative in question is reasonably related to and designed to remedy the identified public health, safety and welfare problems.
>
> " 'The Court must then balance the above two factors against the quantified adverse effects which the ordinance will have upon the need for public housing including affordable housing in the region.' (Fn. omitted.)" (*Building Industry II, supra,* 27 Cal.App.4th at pp. 754-755.)

The court further noted that the more impact Prop. A was proven to have upon public housing, including affordability, the more substantial the police power justification must be to balance the competing interests. (*Id.* at p. 755.)

To summarize briefly for present purposes, the trial court ruled in favor of BIA in phase I of the trial, finding that the City had not rebutted the presumption under Evidence Code section 669.5, subdivision (a) that Prop. A would have an impact on the supply of affordable residential units in the region. In phase II, however, the City prevailed, the trial court finding that Prop. A represented a reasonable accommodation of the competing interests.

Phase III of the trial was based on the evidence from phases I and II, and presented the issues of whether Prop. A conflicted with the public facilities and management

element (PFME) of the City's general plan, or three specified Government Code sections: section 65008, subdivision (c) (prohibiting discrimination against low-income housing), section 65913.1 (establishing appropriate standards for zoning to contribute to the economic feasibility of producing the lowest possible cost housing), or section 65915 (the density bonus law intended to encourage low-income housing). The trial court took the matter under submission and ruled in phase III in favor of the City on all issues, finding no invalidity of Prop. A because of any conflict with the City's general plan (specifically, the PFME), or any conflict with the density bonus provisions of section 65915, or the low income housing law of sections 65008, subdivision (c), and 65913.1.

After judgment was entered accordingly against BIA (and was timely appealed, resulting in our *Building Industry II* opinion), further proceedings as to Del Oro were severed for trial.

4. Del Oro Factual Background

The facts on which this action was based were as follows: Del Oro is a partnership which acquired a 300-acre parcel of property in the City and obtained City approval of a master tentative subdivision map on the property. The planning commission resolution of approval for this master tentative map states, among other things:

> "1. That the Tentative Map is for financing and land management purposes. The approval of the map does not grant any development rights because under the Del Oro Hills Specific Plan, further public hearings on Development Plans

and/or Tentative Maps will be required prior to development."

The project buildout was proposed to be over a five-year period. Del Oro then obtained approval of a specific plan and planned residential development master plan for its development, a proposed complex of a series of smaller residential neighborhoods or villages. The villages were not themselves building sites, as each of them would be sold to another developer for building after Del Oro prepared the infrastructure for the property.

Before the developer could build its village as purchased from Del Oro, it needed to obtain additional approvals for a final master tentative tract map, tentative and final subdivision tract maps and development plans, all relevant grading permits and landscape plans, and building permits.

In December 1985, Del Oro and the City entered into improvement agreements and Del Oro recorded its master final subdivision map in February 1986. Del Oro then obtained construction financing and bonds for its improvement plans to commence the grading and subdivision improvements called for in the subdivision map and other City approvals. Del Oro contracted with a construction company to grade and install storm drains, sewer, water, utilities, and street improvements in the development area. Del Oro entered into contracts to sell several of its villages, conditioned on completion of subdivision improvements before close of escrow. Some of these contracts were pending when Prop. A was proposed and adopted.

A month after Prop. A passed, Del Oro's attorney wrote a letter to .the city attorney requesting an exemption from the effects of Prop. A on Del Oro's property, on the theory it had an implied-in-fact development agreement with the City. This request was denied. Del Oro alleges that when Prop. A was proposed, from that point on, it became practically impossible to market its property. A number of escrows were cancelled and, under business necessity and with its lender's approval, Del Oro later sold four of the villages to one of its constituent partners, Robinhood Homes, Inc. The price, $7.5 million, was $1.5 million below a tentative agreement that was reached to sell the property before Prop. A came on the scene. Other buyers closed their escrows for some of the villages in the latter part of 1987, but Del Oro had to make some $700,000 in concessions to keep the escrows going after Prop. A passed.[4]

Building permits had been issued for 371 of the planned 1,200 units before Prop. A was adopted. Within three and one-half years after Prop. A was adopted, the developers of Del Oro's villages received allocations or exceptions under Prop. A for all of the units necessary to complete the twelve hundred-unit project. Del Oro never applied to build under the low-income exception. Del Oro sold all of its villages within a two-year time frame.

Before Prop. A was adopted, an unrelated developer based in the City, Rancho Del Oro (Rancho), entered into a development agreement with the City to develop 4,840

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[4] These two sets of losses form the main basis of Del Oro's damages claims.

residential units over a 10-year period. (§ 65864 et seq., covering development agreements.) Because of this development agreement, the City exempted Rancho from the effect of Prop. A. Del Oro had no such formal development agreement, although it claimed an implied agreement of the sort existed.

In its complaint, Del Oro sought declaratory and injunctive relief that Prop. A was invalid, and an award of monetary damages on theories of (1) unconstitutional taking of its property, in violation of federal civil rights (42 U.S.C. § 1983), (2) denial of equal protection due to the City's exemption from Prop. A of Rancho, an allegedly similarly situated developer, (3) breach of an implied-in-fact agreement with the City not to interfere with the timing of its development or wrongful denial of a vested rights exemption from Prop. A. As noted above, the issues of validity of Prop. A were resolved in the BIA action, and along with the BIA judgment, an order was entered resolving the causes of action raising those issues in the Del Oro action.[5]

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[5] Del Oro brought seventeen causes of action against the City, but by the time of the summary adjudication motion leading to the judgment we review, was only pursuing seven of them: five on implied contract or covenant or vested rights theories; one for equal protection violations; and one for federal civil rights damages. As noted above, the two causes of action claiming Prop. A was invalid, facially and as applied, were resolved against Del Oro when BIA was resolved. Among the causes of action Del Oro abandoned was one for inverse condemnation under federal and state provisions for "exactions" of the cost of the improvements Del Oro had made at the property.

5. City's Motion for Summary Judgment or Adjudication of the Del Oro Action

After the BIA action was resolved, the City sought summary judgment on Del Oro's claims for damages under its vested rights or federal civil rights theories. (Code Civ. Proc., § 437c.) The motion was denied except for one reserved issue of equal protection, and the City sought writ relief in this court to set aside the denial of the motion. We denied the writ. (Case No. D009124, order of 1/12/89.)

The City's motion was renewed and ultimately granted in its favor. The order first recited that Prop. A had been found valid in the BIA trial, and that ruling applied in the Del Oro case; in addition, Del Oro was not pursuing a number of its other theories. (See fn. 5, *ante*.) On the federal civil rights claims, the trial court ruled no constitutional claim of taking of property could be made because Prop. A substantially advanced a legitimate governmental purpose, and Del Oro had not been deprived of substantially all economically viable use of its property. (*Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825 [*Nollan*].) In addition, the takings claims were deemed not ripe for lack of a meaningful development application, and also barred for lack of pursuit of administrative remedies. The court found the equal protection claim failed because there was a rational basis for the different treatment received by Del Oro and Rancho. The vested rights and implied contract claims were found moot, as the property was sold and all development permits granted, and in any case meritless due to inability of the government to contract away its right to

exercise police power in the future. (*Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 800.)

Del Oro timely appealed. The appeal was consolidated with the BIA appeal up through oral argument, but severed for decision and for purposes of obtaining supplemental briefing. (Order of July 6, 1994.)

DISCUSSION

In our BIA opinion, the issue presented was whether, in light of facts relating to the local entity's compliance with its obligation to meet its share of regional housing needs, there was conflict between Prop. A, a numerical growth control ordinance, and state law or the entity's general plan. (*Building Industry I, supra,* 211 Cal.App.3d at p. 284.) We applied the doctrine of law of the case and the rules announced in *Lesher* to the facts found and established by the trial court, and concluded that Prop. A was invalid when passed because it conflicted with state law as of the time of its adoption, and it is further invalid because it is inconsistent with policies established by the City's general plan. (*Lesher, supra,* 52 Cal.3d at pp. 540-541, 544-545, 547; *Building Industry II, supra,* 27 Cal.App.4th at pp. 766-772.)[6] We found that taken together, the three cited Government Code sections (§ 65008, subd. (c), prohibiting discrimination against low

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[6] In *Lesher,* the Supreme Court held that the growth control initiative before it regulated land use, on its face, and as such, was equivalent to a zoning ordinance. (*Lesher, supra,* 52 Cal.3d at p. 541.) Here, the parties do not dispute that Prop. A is in the nature of a zoning ordinance.

income housing; § 65913.1, requiring that zoning standards contribute to the economic feasibility of producing the lowest possible cost housing; and § 65915, establishing density bonus incentives for low income housing development) clearly show an important state policy to promote the construction of low income housing and to remove impediments to the same. The terms of the City's general plan were also inconsistent with those of Prop. A. We accordingly reversed the BIA judgment with directions to enter a different judgment in accordance with the principles of that opinion. That analysis is incorporated herein as if fully set forth, due to the consolidation at the trial level of the Prop. A validity issues as to both BIA and Del Oro.

After oral argument was held in the consolidated BIA/Del Oro appeals, we severed the matters for decision and obtained supplemental briefing from Del Oro and the City; in addition, the City Attorney of Malibu, as amicus curiae on behalf of the League of California Cities has submitted supplemental briefing. (Cal. Rules of Court, rule 14(b).) As this appeal was originally briefed, Del Oro claimed the trial court erred in granting summary judgment in light of Del Oro's theory that the enforcement of Prop. A resulted in an unconstitutional taking of property. Del Oro further argued that triable issues of material fact remain as to its claim of entitlement to damages for violation of its equal protection rights, due to the exemption of another developer, Rancho, from the effects of Prop. A because of its development agreement with the City. Finally, Del Oro argued that triable issues exist as to

whether Del Oro should have been entitled to an exemption from the effect of Prop. A on an implied contract or vested rights theory.

While these issues still remain before this court, supplemental briefing has focused the "takings" issue on the following points: Under the applicable tests, does an invalid regulation create damage per se, or is something more required to show a taking, such as loss of all economically beneficial use that was substantially caused by the governmental entity's activities? Also, how does Del Oro's status as essentially a wholesaler of land, rather than an on-site developer, affect its claim that Prop. A applied directly to it and caused it loss? Was exhaustion of remedies required as to such a plaintiff, regarding facial or as-applied claims of unconstitutionality? Finally, is this case suitable for summary disposition as having an adequately developed record? With all these issues in mind, we first address the takings claim and then the alternative damages theories: Equal protection and vested or implied contract rights.

I

"Takings" Claims: Inverse Condemnation

Does the invalidity of Prop. A due to its impermissible conflicts with state planning and zoning law and the City's general plan (*Building Industry II, supra,* 27 Cal.App.4th at pp. 766-772) mean that Prop. A does not substantially advance legitimate state interests, and its enactment accomplished some kind of per se taking of Del Oro's property interests? To answer this question we must set forth the applicable taking tests, discuss the

nature of Del Oro's challenges to Prop. A, and decide if as a matter of law the trial court properly determined that no such taking occurred here.[7]

A

Agins Test

"The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." (*Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 415.) In *Agins v. Tiburon* (1980) 447 U.S. 255, 260-261 (*Agins*), the United States Supreme Court outlined the following two-pronged test for regulatory takings:

> "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests [citation], *or* denies an owner economically viable use of his land, [citation]. The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule determines when property has been

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[7] On review of summary judgment, an appellate court examines the facts presented to the trial judge and determines their effect as a matter of law. (*Stratton v. First Nat. Life Ins. Co.* (1989) 210 Cal.App.3d 1071, 1083.) "We also conduct independent review of the trial court's determination of questions of law. We are not bound by the trial court's stated reasons, if any, supporting its ruling; we review the ruling, not its rationale. [Citation.]" (*Ibid.*)

> taken, [citation], the question necessarily requires a weighing of private and public interests." (Italics added.)

In *Nollan, supra,* 483 U.S. 825, the Supreme Court relied on the *Agins* test but stated it in the conjunctive: "We have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land,' [citing *Agins*]." (*Nollan, supra,* at p. 834.) The court further refined the first part of the *Agins* test to explain that there must be a nexus between the conditions that the government sought to impose on the development before it could proceed and the governmental interest that the regulation seeks to further. (*Nollan, supra,* at pp. 834-837.) The regulation must substantially advance the state interest said to justify it; a finding that the regulation has a "rational basis" is not enough. (*Surfside Colony, Ltd. v. California Coastal Com.* (1991) 226 Cal.App.3d 1260, 1270.)[8]

In *Dolan v. City of Tigard* (1994) 512 U.S. ___, ___ [114 S.Ct. 2309, 2316], the Supreme Court reiterated the *Agins* test but stated it in the negative and the conjunctive: "A

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[8] The 9th Circuit Court of Appeals, as well as the California Court of Appeal for the First District, Division Three, has rejected the argument that the *Nollan* "substantial advancement" test applies to regulatory, as opposed to possessory, takings. (*Commercial Builders v. Sacramento* (9th Cir. 1991) 941 F.2d 872, 874; *Blue Jeans Equities West v. City and County of San Francisco* (1992) 3 Cal.App.4th 164, 171.) However, we need not decide this issue because we do not deal with a particular imposed permit condition, but rather with an overall growth control scheme; in addition, as we shall show, only facial challenges to the regulation are properly presented here.

land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.' [Citation, fn. omitted, italics added.]"[9] In all of these formulations, the focus of both parts of the test is on whether property has been taken without just compensation, not on whether a regulation is in the abstract an invalid one; the inquiry must be what effect the regulation has on affected property owners.[10]

In general, growth control ordinances are routinely upheld by federal and state courts as valid exercises of a municipality's police power. (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 602; *Construction Ind. Ass'n, Sonoma Co. v. City of Petaluma* (1975) 522 F.2d 897; *Long Beach Equities, Inc. v. County of Ventura* (1991) 231 Cal.App.3d 1016, 1030.) Such regulations are normally upheld if they bear a "substantial

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[9] See discussion in *First English Evangelical Lutheran Church v. County of Los Angeles* (1989) 210 Cal.App.3d 1353, 1365-1367 (*First English II*) (on remand from U.S. Supreme Court, sub nom. *First Lutheran Church v. County of Los Angeles* (1987) 482 U.S. 304), of the question of whether the two elements of the *Agins* test are "either/or" in nature or if establishment of one part of the test will suffice to show a taking; the court did not have to decide that issue as the ordinance under discussion survived either test. (*Id.* at p. 1367.)

[10] To state a cause of action for inverse condemnation, a landowner must allege not only ownership of the property, but also the governmental entity's taking or damaging of property, and substantial damage to property rights that was substantially caused by the entity's conduct. (*Stoney Creek Orchards v. State of California* (1970) 12 Cal.App.3d 903, 906-907; 5 Witkin, Cal. Procedure (3d. ed. 1985), Pleading, § 641, pp. 91-92.)

relationship to the public welfare" and inflict no irreparable injury on landowners. (*Id.* at p. 1030.) A substantial diminution in value of property is not irreparable injury in this context. (*Ibid.*)

Moreover, because Prop. A was a growth control regulation, it is entitled to some deference in constitutional analysis, regardless of its statutory or general plan infirmities. Thus, "the type of taking alleged is also an often critical factor. It is well settled that a ' "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, [citation], than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.' [Citation.]" (*Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 U.S. 470, 488-489, fn. 18.)

In this case, the City's version of such an ordinance was fatally flawed because of its conflict with related statutory provisions and the applicable general plan. In our *Building Industry II* opinion, however, we were not presented with and did not decide any constitutional challenges to Prop. A; the matter was presented as requiring resolution of conflicting legislative provisions, and Prop. A lost. To decide if this invalidity is of constitutional dimension so as to support takings claims, we must look at the nature of the challenges Del Oro brought against the measure.

B

Facial versus As-Applied Challenges: The Rules

At the outset of this discussion, we dispose of the City's claim in its supplemental briefing that the issue of Prop. A's validity is not adequately presented here because the Del Oro complaint, unlike the BIA complaint, does not cite to section 65008, subdivision (c), prohibiting discrimination against low income housing; section 65913.1, requiring that zoning standards contribute to the economic feasibility of producing the lowest possible cost housing; or section 65915, establishing density bonus incentives for low income housing development. The Del Oro action was consolidated with the BIA action for trial of the validity issues, and the trial court dismissed Del Oro's two causes of action claiming invalidity of the ordinance (facial and as applied) based on its BIA ruling. The issue was and is central to the Del Oro proceedings.

Next, the distinction between facial challenges to regulation and "as-applied" challenges has several aspects. Neither type of challenge, however, can avoid analysis of both prongs of the *Agins* test. (See *First English II, supra,* 210 Cal.App.3d at pp. 1365-67.) Generally, a facial challenge presents an issue of law and case-specific factual inquiry is not required. Thus, in *Gilbert v. City of Cambridge* (1st Cir. 1991) 932 F.2d 51, 55-56, it is explained that a plaintiff may challenge a regulation as unconstitutional on its face by demonstrating that the mere enactment of the law constituted a taking without just compensation, i.e., by denying the owner economically viable use of the land. In *Lucas v. So. Carolina Coastal Council* (1992) 505 U.S. ___, ___ [112 S.Ct. 2886, 2893], the court described

two categories of regulatory action which were compensable without case-specific inquiry into the public interest said to support the regulation. These were (1) where the property owner suffers physical invasion of the property, and (2) where the regulation denies all economically beneficial or productive use of the land. (*Ibid.*)

However, an ordinance is safe from a facial challenge if it preserves, through a permit procedure or otherwise, some economically viable use of the property. (*Gilbert v. City of Cambridge, supra,* 932 F.2d at p. 57.) In such a case, administrative remedies must be pursued if available because the challenge is actually an "as-applied" one. (*Ibid.*) In short, there is also a third category of regulatory takings, where some restrictions burden the property, but the owner is left with some possibility of a beneficial or productive use, so that a case-specific inquiry may be needed to determine if a taking has occurred. (*Lucas v. So. Carolina Coastal Council, supra,* 505 U.S. at p. ___ [112 S.Ct. at p. 2893]; *Tahoe Keys Property Owners' Assn. v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1474-1477.)

In *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 8, fn. 2, 9-13, the Supreme Court took a strict approach to requiring exhaustion of administrative remedies as a prerequisite to challenging a land use ordinance as an uncompensated taking of property. The court held that in challenging a regulatory taking, an owner must afford the governmental entity the opportunity to rescind the regulation or exempt the property from the restriction, by means of a facial challenge through a declaratory relief action, the seeking of a variance if available, and then the

exhaustion of other administrative and judicial remedies. (*Id.* at pp. 13-14, 26.)

C

Application of Rules: No "As-Applied" Challenge

To attack regulation as applied, the plaintiff must show a meaningful application for approval of the project was denied, as was any subsequent application for a variance or other permit. "Informal or tentative development proposals are insufficient to meet these tests. [Citation.]" (*Long Beach Equities, Inc. v. County of Ventura, supra,* 231 Cal.App.3d at pp. 1032-1033.) Here, Del Oro made a letter request, referring to an earlier claim, that it be exempted entirely from the scope of Prop. A; that request was denied.

Analysis of the exhaustion of remedies issue is complicated by Del Oro's status as an intermediary type of developer. It was not to be the ultimate developer of housing on the land, and was thus not in the usual position of a developer seeking building permits. It could, however, have sought approval of tentative subdivision maps and allocations or other specific ruling under Prop. A; it did not. Under the settled rules for property owners, it is evident that Del Oro has failed to perfect an "as-applied" challenge because it did not apply for permits or allocations to develop the property or seek a variance of some type, other than complete exemption. We are reluctant to create a new category of wholesaler of land or intermediary who is exempt from the requirement of exhaustion of administrative and judicial remedies, based solely on Del Oro's timing argument that it lost

profits due to the growth control restrictions which allegedly impeded a timely sale of its property. Del Oro's as-applied claim must be deemed barred for lack of exhaustion of administrative remedies. (*Hensler v. City of Glendale, supra,* 8 Cal.4th at pp. 12-19.)

However, to the extent this is a facial challenge to the constitutionality of Prop. A, through the medium of the cause of action for violation of federal civil rights (42 U.S.C. § 1983), there is no bar of exhaustion of administrative remedies. (*Yee v. City of Escondido* (1992) 503 U.S. ___, ___ [112 S.Ct. 1522, 1532].) Del Oro attacks here the "whole regime" Prop. A imposed on properties in the City, and claims that the ordinance in its entirety does not substantially advance legitimate state interests "no matter how it is applied." (*Ibid.*)

Moreover, we do not believe *Hensler v. City of Glendale, supra,* 8 Cal.4th 1 precludes Del Oro's facial challenge to Prop. A. The prior opinion in this case (*Building Industry I, supra,* 211 Cal.App.3d at pp. 297-298) denied the writs so that the matter would proceed to trial, and it was never contemplated that the facial validity issue could not be addressed without any exhaustion of administrative remedies. If the *Hensler* rule were to be held retroactive in this case, it would undermine the reasonable reliance of the parties on the previously existing state of the law, as established by *Building Industry I.* (*Laird v. Blacker* (1992) 2 Cal.4th 606, 620.) The City conceded in its original respondent's brief, "Judicial inquiry is limited to a determination of whether Prop. A on its face denies Del Oro all economically viable use of its property, or fails to substantially advance any legitimate public interest. [Citations.]" (Italics deleted.)

As the Supreme Court held in *State of California v. Superior Court* (1974) 12 Cal.3d 237, 250-251, a party need not raise challenges to the constitutionality of a statutory measure before an administrative agency operating pursuant to that measure, as a condition of raising that issue in the courts. Further, even though Prop. A did not ultimately affect the eventual use of Del Oro's land, Del Oro is still attempting to challenge the overall manner in which it affected the timing of development, to Del Oro's alleged detriment. Under all the circumstances, no exhaustion of remedies was required to preserve these arguments as to the facial validity of Prop. A.[11]

D

Facial Challenge Cognizable: Theory

Having determined Del Oro's facial attack on Prop. A is cognizable, we outline its theory and first point out what is not in dispute.[12] Prop. A does not affect the nature of the use of Del Oro's property, as Del Oro admits

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[11] It should be noted that Del Oro's requests for declaratory relief that its property could be developed free of the restrictions of Prop. A are clearly moot at this point. Moreover, it does not now seek damages for any pre-adoption effects of the proposal of Prop. A.

[12] On this point, Del Oro first argues that summary judgment is not appropriate for the issue of deprivation of all economically viable use of property, on the theory that the state of the law in this case is unsettled and factual issues abound. However, since Del Oro is attempting to make a facial challenge to the measure, it must make its showing as a matter of law, as suggested in *Lucas v. So. Carolina Coastal Council, supra,* 505 U.S. at p. ___ [112 S.Ct. 2886, 2893].

that its property remains zoned and specifically planned as it was in 1986, before Prop. A was introduced. Instead, Prop. A allegedly interfered only with the timing of development. Del Oro contends,

> "Prop. A threw a 'monkey-wrench' into the *timing* of a *time-crucial* cycle from which DEL ORO could not extricate itself. Because Prop. A rendered it impossible to market all the Villages on time in a conventional market, DEL ORO was forced to sell its Villages at about $2 Million less than if Prop. A had not come along, and further because of Prop. A, DEL ORO was 'over a barrel' and had to make additional concessions to its buyers which lost DEL ORO hundreds of thousands of dollars."

However, Del Oro does not dispute that it sold all its property within its own time frame and it or its buyers received permits to develop all the property for residential use within five years of the 1987 adoption of Prop. A. Del Oro's damages claims are thus based upon its lost profits, which it blames on Prop. A's interference with its projected timing of its land development deals. It argues, "In the bundle of rights which constituted Del Oro's property, the only 'stick' which had any value or meaning to Del Oro in mid-1987 was the right to *sell* its property. Only a sale, and a quick one at that, would save Del Oro and its principals from financial ruin. Oceanside drastically impaired that right with Prop. A." Del Oro theorizes, "reasonable *profit* expectations, backed by investment, are protected against governmental destruction by the Fifth Amendment just compensation clause."

E

Was There Any Taking Due to the Mere Enactment of Prop. A?

There are several problems with Del Oro's attempt to show that, as a matter of law, a taking of property occurred here. First, we cannot accept Del Oro's theory that satisfaction of one element of the *Agins* test (i.e., that there was an invalid regulation) is enough to establish a taking as a matter of law. In *Nollan, Lucas,* and *Dolan,* the United States Supreme Court's analysis of the taking issue inextricably interlinked both the regulation's validity and the question of whether any economically beneficial use of the property remained in light of the regulation. In light of later authority, *Agins* did not establish an "either/or" type of test.

Next, it is well established that "[m]ere fluctuations in value during the process of governmental decision-making, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a taking in the constitutional sense' [citations]." (*Agins v. Tiburon, supra,* 447 U.S. at p. 263, fn. 9 [discussing whether pre-condemnation activities by a city constitute a taking].)[13] Similarly, although the Supreme Court in *First Lutheran Church v. Los Angeles County, supra,* 482 U.S. at pages 319-320 held

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[13] Although the court in *First Lutheran Church v. Los Angeles County, supra,* 482 U.S. at pp. 319-320, discussed this holding in *Agins,* and interpreted it to mean "that the valuation of property which has been taken must be calculated as of the time of the taking, and that depreciation in value of the property by reason of preliminary activity is not chargeable to the government," *Agins* was not disapproved or overruled by later Supreme Court authority on this point.

that property owners must be compensated for takings that occurred during the effective period of a regulation that was later struck down as violative of the Fifth Amendment ("temporary takings"), a determination must first be made that the regulation accomplished a taking. (See *First English II, supra,* 210 Cal.App.3d 1353 [there was no taking so no remedy in damages].)

On a similar point, Del Oro claims it is entitled to at least nominal damages for a per se constitutional violation of its property rights. (*Memphis Community School Dist. v. Stachura* (1986) 477 U.S. 299, 308, fn. 11.) However, as we have suggested above, the statutory and other infirmities found in Prop. A do not convert it into an unconstitutional taking of property on the undisputed facts here. An invalid regulation is not necessarily an unconstitutional one. (*Moore v. City of Costa Mesa* (9th Cir. 1989) 886 F.2d 260; see *Keystone Bituminous Coal Assn. v. DeBenedictis, supra,* 480 U.S. at pp. 488-489, fn. 18: " ' "[A] taking may more readily be found when the interference with property can be characterized as a physical invasion by government, [citation], than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." ' [Citation.]") The only available remedy for Del Oro is invalidation of the ordinance, as has already been adjudicated in our *Building Industry II* opinion. (See *Moore v. City of Costa Mesa, supra,* 886 F.2d 260.)

This record shows that Del Oro was essentially engaged in speculation in land development. Although it complains Prop. A was solely responsible for its inability to sell some of its 13 villages for as much as it sought, or exactly when it sought, market forces cannot be ignored

in analyzing causation of loss or damage here. The courts have been unsympathetic to such claims of lost value of property. Even though the meaning of the concept of deprivation of substantially all economically viable use of property is somewhat elusive, "the general rule is that 'the existence of permissible uses determines whether a development restriction denies a property holder the economically viable use of its property.' [Citation.] [¶] The denial of the highest and best use does not constitute an unconstitutional taking of the property. [Citation.] Even where there is a very substantial diminution in the value of land, there is no taking. [Citations.] The burden of proof is on the applicant, who faces an uphill battle. [Citation.]" (*Long Beach Equities, Inc. v. County of Ventura, supra,* 231 Cal.App.3d at p. 1036.)[14] In any case, the undisputed facts showed that this property was eventually sold and used for the same purpose which had been planned all along, i.e., residential development. It should

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[14] In its reply brief, Del Oro suggests that *Lucas v. So. Carolina Coastal Council, supra,* 505 U.S. at p. ___ [112 S.Ct. at p. 2888], undermines any rule that a mere diminution in value equals no taking. *Lucas* is distinguishable on its facts as involving a taking which deprived the landowner of all economically beneficial use of land, even though that deprivation turned out to be temporary (the subject regulation was amended to permit applications for variances; *id.* at pp. ___ - ___ [2889-2891].) Moreover, the Supreme Court majority opinion recognized that there are some arbitrary aspects of the "deprivation of all economically beneficial use" rule, and that in some cases, a landowner with 95 percent loss of use will recover nothing in inverse condemnation, while a landowner with a total loss will be compensated in full. The majority observed without undue concern, "Takings law is full of these 'all-or-nothing' situations." (*Id.* at p. ___, fn. 8 [2895, fn. 8].)

also be recalled that Del Oro does not now seek compensation for exactions, i.e., the cost of improvements the City required it to make at the property. Del Oro cannot show any facial invalidity of the ordinance due to any deprivation of all economically beneficial use of the property. (*Lucas v. So. Carolina Coastal Council, supra,* 505 U.S. at p. ___ [112 S.Ct. at p. 2893].)

In conclusion, this record is adequate to resolve the facial challenges to Prop. A and the takings issues as a matter of law. Accordingly, the trial court did not err in granting summary adjudication and judgment on the takings claim.

II

Equal Protection

Del Oro's claims of entitlement to damages due to violation of its right of equal protection may be disposed of summarily. Del Oro argues that there is no rational basis to distinguish between Rancho, a developer which entered into a development agreement with the City, and itself, as a developer without such an agreement but which also made substantial expenditures in constructing subdivision improvements on its property. Del Oro's theory is that whatever rights Rancho's development agreement provided it, the agreement did not protect it against timing controls such as were imposed by Prop. A, and thus should not have been used to distinguish between the two developers for purposes of applying Prop. A (§ 65866, governing development agreements).

"Absent the allegation of the invasion of fundamental rights or the existence of a suspect classification, there

is no violation of equal protection unless the classification bears no rational relationship to a legitimate state interest. [Citations.] This is true even if some discrimination is alleged. [Citation.]" (*Long Beach Equities, Inc. v. County of Ventura, supra,* 231 Cal.App.3d at p. 1041.) In our view, the existence of the development agreement provides a rational basis to distinguish between these two developers for purposes of determining whether any vested rights to development had accrued before Prop. A went into effect. The purpose of Rancho's development agreement was to protect it from changes made by subsequent land use regulations regarding uses and densities. Certainly, those were the main focus of Prop. A, even though timing controls were used to promote those purposes. No triable issues remain as to any damages claimed by Del Oro for denial of equal protection under these circumstances.

III

Vested Rights/Implied Contract Theories

Finally, Del Oro claims it should be considered to have an implied-in-fact development agreement with the City, due to its construction of subdivision improvements on its property pursuant to agreement with the City, such that vested rights arose.[15] Damages are sought for the

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[15] Although the City contends that Del Oro's claims were not ripe for decision by the trial court, Del Oro's first amended complaint alleges that it sought an exemption under Prop. A which was denied. Also, a claim for damages for the denial of a vested rights exemption was pled in the complaint. To this extent, these damages claims were properly before the court (in

denial of a vested rights exemption from the effects of Prop. A. In finding these claims unmeritorious, the trial court relied on the authority of *Avco Community Developers, Inc. v. South Coast Regional Com., supra,* 17 Cal.3d at p. 800, for the proposition that the City cannot contract away its police power. The main issue in analyzing a vested rights question is whether any further approvals are contemplated before development rights vest. A promise such as that implied by a building permit is necessary before vested rights may accrue. (*Consaul v. City of San Diego* (1992) 6 Cal.App.4th 1781, 1800.) In this case, the master tentative subdivision map approved by the City was not a final discretionary approval. The planning commission resolution states that the tentative map is made for financing and land management purposes, and further public hearings were required to be held on development plans and/or tentative maps before any development rights matured under the tentative map.

In the alternative, Del Oro pleads that equitable estoppel should prevent application of Prop. A to its project. It contends there were implied promises by City officials that the proposed use would not be prohibited by regulations, and Del Oro reasonably relied on these promises to its detriment, by constructing the improvements on the property. We fail to see how any reasonable reliance on implied promises was possible in light of the

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contrast to the takings claims where Del Oro failed to pursue any administrative remedies so as to create a ripe takings claim and where Del Oro did not pursue its takings claim for the "exactions," i.e., the improvements at the site).

express statement in the planning commission's resolution approving the master tentative subdivision map to the effect that the approval did not grant any development rights because further public hearings on development plans and/or tentative maps would be required. There was no express representation by the government that this property would be exempt from future regulations governing the timing of development. Summary adjudication and judgment as to this claim were proper.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

/s/ Huffman
HUFFMAN, Acting P.J.

I CONCUR:

/s/ Froehlich
FROEHLICH, J.

I CONCUR IN THE RESULT:

/s/ Nares
NARES, J.

APPENDIX B

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

BUILDING INDUSTRY ASSOCIATION, OF SAN DIEGO, INC.,	) D016581
Plaintiff and Appellant,	) (Super. Ct. No. N37638)
v.	) ORDER CERTIFYING OPINION FOR PUBLICATION AND DENYING REHEARING
CITY OF OCEANSIDE,	
Defendant and Respondent.	) (Filed Aug. 16, 1994)

THE COURT:

The opinion filed July 19, 1994, is ordered certified for publication.

The attorneys of record are:

Worley, Schwartz, Garfield & Rice, and Donald R. Worley for Plaintiff and Appellant.

Myers, Widders & Gibson, Katherine E. Stone, J. Roger Myers, and Daniel S. Hentschke, City Attorney, for Defendant and Respondent.

Pacific Legal Foundation, People for Affordable Housing, Ronald A. Zumbrun, James S. Burling and Edward J. Connor, Jr., as Amici Curiae on behalf of Plaintiff and Appellant.

The petition for rehearing is denied.

/s/ Huffman
HUFFMAN, Acting P.J.

Copies to: All parties

CERTIFIED FOR PUBLICATION

~~NOT TO BE PUBLISHED IN OFFICIAL REPORTS~~

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

BUILDING INDUSTRY ASSOCIATION OF SAN DIEGO, INC., Plaintiff and Appellant, v. CITY OF OCEANSIDE, Defendant and Respondent.	D016581 (Super. Ct. No. N37638) (Filed Jul. 19, 1994)

APPEAL from a judgment of the Superior Court of San Diego County, Herbert B. Hoffman, Judge. Reversed with directions.

This appeal by the Building Industry Association of San Diego, Inc., a California nonprofit corporation (BIA) presents questions as to the validity of a residential growth control initiative, Chapter 32A of the City of Oceanside Municipal Code, commonly known as Proposition A (Prop. A), adopted by the voters of the respondent City of Oceanside (the City or Oceanside). Actions for declaratory and other relief by BIA and Del Oro Hills (Del Oro), a partnership, the plaintiff in a related action (judgment in which was also appealed and is pending before this appellate panel), were consolidated below, with Del Oro adopting the BIA arguments as to the invalidity of Prop. A, and additionally asserting its own damages claims in further trial proceedings. The City

obtained judgment in its favor in a three-phase court trial on BIA's complaint as to the validity of Prop. A; summary judgment was then rendered for the City against Del Oro. By stipulation, appeals of the judgments against BIA and Del Oro were consolidated for hearing by this court, although we have vacated the consolidation order for the sole purpose of issuing separate opinions in the two matters. (D017139.)

We have concluded that the BIA judgment must be reversed because the trial court erred in its application of the doctrine of law of the case based upon this court's prior opinion in writ proceedings arising out of the trial court's denial of BIA's motion for summary adjudication on the issues of whether Prop. A conflicted with the City's general plan and with state planning and zoning law (Gov. Code, § 65000 et seq.).[1] (*Building Industry Assn. v. Superior Court* (1989) 211 Cal.App.3d 277 [hereafter *Building Industry* or prior opinion].) Moreover, under the standards set by *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531 (*Lesher*), Prop. A is facially in conflict with the City's general plan and with state planning and zoning law. In light of this finding of conflict, we need not reach the issue presented as to the appropriate burden of proof on the City under Evidence Code section 669.5 (whether the City had to show that Prop. A bore a real and substantial relationship to the public welfare of the citizens of Oceanside, or rather that its provisions were "necessary" to protect the public welfare).

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[1] All statutory references are to the Government Code unless otherwise specified.

FACTUAL AND PROCEDURAL BACKGROUND

1. Adoption of Prop. A

Our prior opinion contains the following summary of the adoption and content of Prop. A, alternatively referred to as Chapter 32A:

> "Ch. 32A, adopted by the Oceanside electorate in April 1987, declares one of its purposes is 'to augment the policies of the City as recorded in the General Plan and City ordinances relating to the regulation of residential development,' and '[i]n order to accomplish this purpose, the City must be able to control the rate, distribution, quality and economic level of proposed development on a year to year basis.' Ch. 32A adopts a 'Residential Development Control System' (RDCS) which, with what may be significant exceptions, adopts a maximum number of dwelling units to be constructed each year, called annual allotments. The allotments are 1,000 for 1987 and 800 for each year thereafter until December 31, 1999, with power granted to the City Council to modify the annual allotment by an amount no greater than 10 percent more or less for any given year and a requirement the annual allotment for a next succeeding year be adjusted higher or lower in order to redress any excess or deficit in the preceding year. Excepted from the RDCS are the following: '(a) Projects of not more than four residential dwellings, limited to only one such project per developer per calendar year.
>
> " '(b) Fourplexes or less numbered multiple dwellings on a single existing lot.

" '(c) Single family residential units on a single existing lot.

" '(d) Rehabilitation or remodeling of an existing dwelling, or conversion of apartments to condominiums, so long as no additional dwelling units are created.

" '(e) Units within the legally designated redevelopment project area.

" '(f) Those specific Units which are formally dedicated for occupancy by low income persons or senior citizens pursuant to the provisions of applicable federal, state, or local laws or programs provided these types of units are spread equitably throughout the city and not concentrated in one neighborhood. For the purposes of this section, a project is funded or subsidized pursuant to applicable federal, state or local laws or programs if it receives a loan, grant or continuing financial subsidy for the purpose of developing low-income or senior citizen housing units. This section does not exempt low income or senior citizen projects built with density bonuses or other development considerations under any program.

" '(g) Single family dwelling unit projects with lots an average of which are 10,000 square feet or better, which can achieve a minimum of 70% or better, of the maximum awardable points using the Residential Development Evaluation System are exempt.'

"Ch. 32A, in addition, provides for application, evaluation and award of development allotments which must be granted before a building permit may be issued." (*Building Industry, supra,* 211 Cal.App.3d at pp. 285-286.)

Under Prop. A, projects are reviewed by a "Residential Development Evaluation Board" (the Board) made up of members of the City's planning commission, who evaluate proposed projects for their impact upon public facilities and services (the "A" criteria) and site and architectural quality (the "B" criteria). A project which does not receive a score of 51 percent on the "A" criteria and 70 percent on the "B" criteria is eliminated from consideration for an annual allocation. The Board's recommendations are forwarded to the City Council, which makes the annual allocations.[2]

2. Oceanside's Land Use Regulation

At the time Prop. A was adopted, there were a number of existing land use regulations in place in the City. Since 1982, the City had had an interim growth management element (IGME) as an element of its general plan, requiring projects with negative fiscal impacts to be approved only by a supermajority of the planning commission and city council, and only if there were offsetting benefits. Since 1979, the City's general plan had a public facilities and management element (PFME), which stated as its objective "[t]o influence the timing of development

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[2] All projects have already received the minimum points under the "A" list (infrastructure and services) since they have already received tentative subdivision map approval at that stage. To obtain such a map, the project must be consistent with the City's general plan and have been reviewed under the California Environmental Quality Act (CEQA) for its impact on the City's infrastructure.

and to direct it to those locations within the City that avoid or minimize any adverse fiscal, economic, social or environmental impacts." The PFME divided the City into four areas and gave priority to development in those areas where adequate services were available. The PFME stated a policy of avoiding "direct controls on the number or location of new housing units built. . . . " Neither the IGME nor the PFME gave the City the power to regulate the rate, timing or sequencing of development.[3]

The PFME used the method of planning for growth by encouraging assessment districts and impact fees. The PFME was adopted by the City in light of a compound annual growth rate of 6.3 percent since 1970. An environmental impact report (EIR) for the PFME states that development was expected to continue in the range of 900 to 2,000 housing units per year through 1995, a range of 2.9 to 7 percent compound annual growth through 1995. The EIR for the PFME points out that that measure rejected the use of a point system, such as would later be used in Prop. A, with the explanation that "[p]oint systems usually are flawed by the potential for a high score for one service to offset a low score for another" and on the theory that "the problem of adding apples and oranges and then considering only the total is difficult to avoid." The EIR also rejected a "periodic comparative evaluation" system, such as Prop. A would later adopt.

In 1986, the year before Prop. A was adopted, the city council adopted a new land use element (LUE) of the

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[3] The IGME was repealed in early 1988 because of concerns it had not accurately forecasted the cost of development.

general plan, setting forth the city's long-term goals, objectives, and policies for development. The LUE calls for but does not establish a timing mechanism to regulate residential development. At the time the LUE was adopted, the City recognized the PFME had not solved all the City's growth-related problems. However, no official City action had been taken to invalidate the PFME.

3. The City's Growth Status as of 1987

In the 1970's, the City's growth rate had reached 8.94 percent per year. While the City's population grew by 89.4 percent from 1970 to 1980, the County's population increased by 37.1 percent. The growth rate as of 1987 was 5 percent annual population increase, equivalent to 60 percent growth if sustained for a decade. The City's expert witness, Dr. Myers, a professor of urban and regional planning, testified that a 1 percent growth rate is normal, and 2 percent per year or 25 percent per decade is a healthy growth rate. In his opinion, at 40 percent growth per decade, it is difficult to "keep up" with a city's growing population. "[W]ith rapid growth the needs escalate[ ] and you are always playing catch up."

Conflicting evidence was presented about the City's ability to accommodate growth. The trial court heard evidence that there were severe deficiencies in facilities and services, such as the road system, fire, paramedic and police facilities and response times, schools, libraries, parks and recreation facilities. There were drainage and sewer problems. However, several City officials and the City planner testified that the City's infrastructures were in reasonably good shape.

4. Regional Supply of Low Income Housing

Pursuant to state law mandate, the San Diego Association of Governments (SANDAG) determines the region's share of the state's growth and allocates a regional share for a five-year period to each city and incorporated areas of the county. Dwelling units thus allocated to the City are referred to in this opinion as the "regional share." Evidence was presented at trial as to the City's regional share for the 1985 through 1991 housing element period, by income category, as follows:

"	Very Low			
"Total	[Income]	Low	Moderate	All Others
"	0-50%	50-80%	80-120%	Over 120%
"9,107	2,049	1,576	1,757	3,726"

For the 1991 through 1996 housing period, the figures were as follows:

"	Very Low			
"Total	[Income]	Low	Moderate	All Others
"	0-50%	50-80%	80-120%	Over 120%
"7,463	1,716	1,269	1,567	2,911"

5. BIA Files Its Action

Shortly after Prop. A was adopted, BIA and 10 developers sued the City under several theories contending Prop. A was invalid on its face and seeking declaratory and injunctive relief.[4] After the trial court denied cross-

[4] Nine of the ten developers dismissed their actions. The remaining one, Del Oro, pursued its action in consolidation with the BIA action. Del Oro has appealed the adverse judgment in its action. (D017139.)

motions for summary judgment and summary adjudication, its order was upheld by this court in our prior opinion. We concluded that invalidity of a growth control ordinance "can be established only by determining facts bearing on whether the enactment truly conflicts with state law and its purposes." (*Building Industry, supra,* 211 Cal.App.3d at p. 290.[5] We stated that whether the regional housing needs as established by SANDAG will be met by the City was a question of material fact that awaited proof. (*Id.* at p. 293.) We explained that some factual determinations by the trial court would of necessity have to be projections of the reasonable probability of accommodating regional housing requirements in future housing periods. (*Id.* at p. 294.) We were unable to establish the validity of any of BIA's various asserted conflicts between Prop. A and state law "without reference to established facts." (*Ibid.*) We further found that there was present no clear invalidity of Prop. A due to inconsistency with the City's general plan, on the basis that

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[5] One of the asserted conflicts with state law which BIA argued in the prior appeal was whether Prop. A was in conflict with section 65915, density bonus law. (*Building Industry, supra,* 211 Cal.App.3d at pp. 282-283.) We do not find any reference in the prior opinion to the other two sections which BIA currently pursues as asserted conflicts with state law, i.e., section 65008, subdivision (c), the prohibition on discrimination against low income housing, or section 65913.1, establishing appropriate standards for local zoning to contribute to the economic feasibility of producing the lowest possible cost housing. In our prior opinion, we discussed the asserted conflicts with state law to some extent, but declined to decide them in light of the factual determinations which remained to be made. (*Building Industry, supra,* at pp. 294-295.)

"factual determinations need to be made before the question of inconsistency can be resolved." (*Id.* at p. 297.)

In accordance with the prior opinion, the trial court scheduled trial of the BIA lawsuit, and consolidated Del Oro issues, in three phases. Phase I addressed the issues raised by Evidence Code section 669.5, subdivision (a), as to whether the City had successfully rebutted the statutory presumption that Prop. A was "presumed to have an impact on the supply of residential units available in an area which includes territory outside the jurisdiction of the City. . . . " (Evid. Code, § 669.5, subd. (a).[6] In Phase I, the trial court made findings that the City had met its regional share of all new residential housing units for the period between 1986 and 1991, and that it would meet the same regional share requirement for the next housing element period, 1991 through 1996. As to the next housing element period, 1996 through 2000, the court found it probable that the City would also meet its requirements for that period.

However, the court went on to find that when Prop. A took full effect in 1988, affordable housing in the City

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[6] In pertinent part, Evidence Code section 669.5, subdivision (a) reads: "Any ordinance enacted by the governing body of a city . . . which (1) directly limits, by number, the building permits that may be issued for residential construction or the buildable lots which may be developed for residential purposes, or (2) changes the standards of residential development on vacant land so that the governing body's zoning is rendered in violation of section 65913.1 of the Government Code is presumed to have an impact on the supply of residential units available in an area which includes territory outside the jurisdiction of the city. . . . "

took a dramatic decline. There was a drastic reduction in the supply of more affordable housing (apartments, condominiums and townhouses) as compared to detached residential homes after the implementation of Prop. A. The court noted that from April 1987 to March 1990 only 415 total building permits were issued under Prop. A's exception subdivision (f) for low income/senior housing, and concluded that the Prop. A exception subdivision (f) for low income persons or senior citizens was not generating enough new housing units to approach the required SANDAG figures. The City had not shown that any other exception to Prop. A was generating low income housing (except for fourplex units), and that the dwelling units generated by the annual allotment would not be available to low income families due to the point ranking system encouraging unit size, reduced density and other expensive features. Declining to consider future mitigation measures to be proposed by the City, on the grounds that the court must make its decision on the present impact of Prop. A, the trial court found that the City had not rebutted the presumption under Evidence Code section 669.5, subdivision (a) that Prop. A would have an impact on the supply of affordable residential units in the region. The City challenged the trial court's ruling on Phase I by writ application to this court, which was denied by order of November 27, 1990. (D013199.)

6. Phase Two Trial and Findings

Under Evidence Code section 669.5, subdivision (b), the City had the burden of proof that Prop. A was "necessary for the protection of the public health, safety, or welfare of the population of the city. . . . " (*Ibid.*) The trial

court rejected BIA's argument that Evidence Code section 669.5, subdivision (b) established a very strict test for the validity of such building permit cap ordinances, holding that instead the section merely recapitulated the standards set forth in *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 607-609 (*Livermore*). That is, the trial court agreed with the City's interpretation of "necessary" in Evidence Code section 669.5, subdivision (b) as "reasonably related to" the protection of the public health, safety or welfare of the affected population. Thus, the court set forth as the appropriate "balancing test" for Phase II:

> "The City has the burden of proof by the preponderance of the evidence that (1) there are real and substantial 'problems relating to its police power to protect public health, safety and welfare of its population' (either present or reasonably anticipated), and (2) that the ordinance or initiative in question is reasonably related to and designed to remedy the identified public health, safety and welfare problems.
>
> "The Court must then balance the above two factors against the quantified adverse effects which the ordinance will have upon the need for public housing including affordable housing in the region." (Fn. omitted.)

The court further noted that the more impact Prop. A was proven to have upon public housing, including affordability, the more substantial the police power justification must be to balance the competing interests.

In applying this balancing test, the trial court analyzed the evidence presented of the implementation thus far of Prop. A (1987-1990) and also the evidence

forecasting its effect into the future (through 2000), as a means of judging the validity of Prop. A as of its adoption date, April 1987. The court noted that Prop. A was to be used *to time development* with relation to adequate services *over its duration*. Thus, the trial court clearly ruled that evidence of the 1987-1990 implementation of Prop. A was circumstantially relevant to the determination of whether Prop. A was reasonably designed to accomplish its objectives. It explained in the statement of decision that it was required to balance the City's problems and the relationship of the ordinance to the problems versus the "quantified adverse effects which the ordinance [would] have upon the need for public housing including affordable housing. . . . " The overall balancing test had to be applied as of the adoption date, 1987. The issue presented was Prop. A's impact as presently written, not as potentially amended. In summary, the trial court had to decide whether Prop. A was valid as of 1987, when its future effects were taken into account, i.e., as shown by the implementation and forecasting evidence that was presented to show how Prop. A worked out in practice.

In making its specific findings, the trial court first calculated that based on the 443 housing unit allocations issued in the first three and one-half years of Prop. A's effective period, in the categories of very low and low income and fourplexes, there would be a deficiency of approximately 2,350 units in those categories for the current housing period (1991 through 1996). The court found there would be an additional similar deficiency in moderate income units. The court then found that Prop. A's impact during the 1991 through 1996 housing period

represented at least 33 percent of the City's regional share requirements (which represented a total of 7,463 units). The court then estimated that, based upon a family of four persons, approximately 10,000 persons might be deprived of anticipated housing needs in the region in that current housing period, and a similar number would likely be denied housing over the next housing period.

Moving on to an analysis of the competing interests or justification for Prop. A, the court summarized the evidence given of the City's current infrastructure problems, and concluded that the City was undergoing an "unhealthy" 5 percent growth rate, although the court acknowledged that this rate was down from 8.94 percent in the 1970's. Although the court acknowledged that BIA had successfully called into question the City's position that there were glaring infrastructure deficiencies at the time Prop. A was adopted, the court concluded that, based on the unhealthy growth rate, the existing infrastructure deficiencies became more meaningful and subject to more concern relating to the public welfare, such that the "unhealthy growth rate" as of 1987 created real and substantial problems which the City could reasonably anticipate to occur in the near future.

The court then analyzed the state of the existing regulations at the time that Prop. A was adopted, noting that the City had growth management tools in the tentative subdivision map act and CEQA procedures, the IGME, the PFME, and the LUE and a managed growth ordinance. The court then concluded that the City had the authority to implement a stronger ordinance or initiative, such as Prop. A. The court then found that Prop. A had a reasonable relation to the problems it was designed to

address, based on its ranking system and "A" and "B" list criteria, and it was too speculative to say the City would disregard the objectives of the initiative even though the number of units permitted under Prop. A had actually been higher than the number permitted before it went into effect.[7]

To complete the balancing test of the competing interests affecting Prop. A, the trial court reiterated that about 20,000 people had, in its estimation, probably been deprived of affordable housing during the term of Prop. A, but that approximately 40,000 people would probably benefit from Prop. A, insofar as it promoted quality of life considerations. This 40,000 figure was derived from a family of four, based on a projected 10-year allocation of 8,000 housing units (32,000 persons) during the duration of Prop. A, with an additional 7,800 persons benefiting from the 10,000 square foot lot exception. The trial court thus concluded that although the denial of housing to the 20,000 projected population should in some ways outweigh the disadvantages of a reduced quality of life if Prop. A were not in effect, nevertheless some persons denied housing would be able to live elsewhere, and the

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[7] Although the trial court noted that the 10,000 square foot lot exception to Prop. A was not justified by an alleged current imbalance in housing in favor of lower-end housing, and also noted that the 10,000 square foot lot exception had hurt the City's position in the Phase I trial, as it represented an adverse effect upon the availability of low income housing, the court found no such adverse effect in the Phase II trial from that exception. The trial court explained that the 10,000 square foot exception was subject to the ranking criteria, as were all other projects under Prop. A.

benefits to the 40,000 people who would obtain an enhanced quality of life under Prop. A should outweigh the deficiencies to the 20,000 persons kept out of the housing market. The trial court thus found that Prop. A represented a reasonable accommodation of the competing interests, and ruled in favor of the City in Phase II.

7. Phase III Trial and Findings

Phase III of the trial relied on evidence from Phases I and II, and presented the issues of whether Prop. A conflicted with either the PFME element of the City's general plan, or three specified Government Code sections: section 65008, subdivision (c) (prohibiting discrimination against low income housing), section 65913.1 (establishing appropriate standards for zoning to contribute to the economic feasibility of producing the lowest possible cost housing), or section 65915 (the density bonus law intended to encourage low income housing).[8] The trial court took the matter under submission and

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[8] Under the terms of the density bonus law, section 65915, as to a developer which agrees to construct at least 25 percent of units of a housing development for low or moderate income families, or 10 percent for lower income households, a city shall grant a density bonus equivalent to a density increase of at least 25 percent over otherwise applicable regulations, or provide other incentives of equivalent value. This version was in effect at the time Prop. A was adopted. Section 65915 has been amended since adoption to shift the emphasis to low and very low income households, as opposed to low or moderate income households, and to require the density bonus to be granted in addition to other concessions, as opposed to the prior choice between a density bonus or financial incentives of equivalent value.

ruled in favor of t e City on all of the issues, explaining that although BIA had made a persuasive showing that Prop. A conflicts with the density bonus provisions of section 65915, the court was bound by the prior decision in the case, ruling that state law did not preempt Prop. A and there was no facial conflict between Prop. A and section 65915 at the time Prop. A was adopted. The court further ruled that even in light of BIA's showing of conflict between Prop. A and the density bonus law, the low income/senior exception to Prop. A (subd. (f)) should not be invalidated because section 69515 was not triggered until a developer proposed a housing development, by submitting a preliminary proposal to which the City was required to respond by notifying the developer of the procedures it planned to use to comply with the density bonus law (i.e., by waiving or modifying development and zoning standards which would otherwise inhibit the utilization of the density bonus on specific sites). Other findings were made as to sections 65008, subdivision (c), and 65913.1 (to be explained in pt. II D, *post*).

Judgment was entered accordingly and further proceedings as to Del Oro were severed for trial. (See D017139.) BIA timely appealed the judgment.

DISCUSSION

BIA presents as its threshold issue on appeal whether the trial court properly interpreted Evidence Code section 669.5, subdivision (b), as requiring the City to show only that Prop. A was reasonably related to the public health, safety, and welfare, as opposed to showing it was "necessary" to promote those objectives. The City goes back

even further in its respondent's brief and argues that the trial should have ended with Phase I, and that the trial court should have found that the City adequately rebutted the presumption of Evidence Code section 669.5, subdivision (a), that Prop. A had an impact on the regional supply of residential units.[9] The City responds to BIA's assertion that the wrong standard was used by claiming that in any case, whatever standard or whatever manner of balancing the trial court used, the evidence supports the judgment.

Having studied these issues, we decline to base our decision on any of them. Rather, the dispositive issue presented is the issue of whether Prop. A impermissibly conflicts with either the City's general plan, i.e., its PFME element, or state law provisions litigated at trial (§§ 65008, subd. (a), 65913.1, or 65915). When we apply the doctrine of law of the case and the rules announced in *Lesher, supra*, 52 Cal.3d 531, on the facts found and established by the trial court, we conclude that Prop. A was invalid when passed because it is inconsistent with policies established by the general plan, and it is further invalid because it conflicted with state law as of the time of its adoption. (*Id.* at pp. 540-541, 544-545, 547.) Because

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[9] The City filed no cross-appeal and has not shown that review of this issue is necessary to determine whether any error was prejudicial as to appellant, so as to bring itself within the statutory exception to the requirement that a respondent must file its own notice of appeal in order to obtain affirmative relief by way of appeal. (Code Civ. Proc., § 906; see Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs (Rutter 1993) § 8:195, p. 8-68.) Thus, we are not required to decide respondent City's assertions of error in this respect.

the trial court should have ruled that Prop. A was facially in conflict with the PFME and with state law, as expressed in the cited Government Code housing statutes, and because the evidence showed that, as applied, Prop. A remained in conflict with those provisions, the issue of the proper standard to apply to assess Prop. A becomes moot in light of the measure's invalidity *ab initio*.

We begin our discussion of the conflict issue with an analysis of the law of the case effect of our prior opinion, and then discuss the tension between the policies promoted by the PFME and state law, on the one hand, and Prop. A, on the other.

I

Law of the Case

In its statement of decision on Phase III of the BIA trial, the trial court outlined its view of the effect of the prior opinion upon its ruling on the issues presented regarding the alleged conflict of Prop. A with the City's general plan and/or the three particular Government Code sections relied on by BIA (§§ 65008, 65913.1, 65915). The court first cited *People v. Rath Packing Co.* (1974) 44 Cal.App.3d 56, 66-67, for the rule that issues of law that were before and decided by the Court of Appeal are law of the case and binding on the trial court. The court then listed the following five issues of law which it ruled precluded the parties from relitigating the claims that Prop. A is facially inconsistent with the general plan's PFME or Government Code sections 65008, 65913.1, or 65915:

"1. The Court of Appeal rejected Plaintiffs' claims (among others) that there is a facial inconsistency between Prop. A and (1) the PFME of the City's general plan, or (2) Government Code § 65008, or (3) Government Code § 65913.1, or (4) Government Code § 65915. ([*Building Industry v. Superior Court, supra,*] 211 Cal.App. 3d 277, 294, 295 and 297.) The Court considered a 'checklist of twelve (12) asserted conflicts which BIA presents,' and held 'the arguments are unconvincing and lack merit.' The Court then specifically examined some of the code sections in the checklist (*Id.* at [p.] 294) and stated 'due to a similar lack of merit in BIA's other arguments of conflict, we deem it unnecessary to address them seriatim.' (*Id.* at [p.] 295.)

"2. The Court of Appeal stated the rules that Prop. A must be presumed valid and comes before the Court with every intendment in its favor. 'If the validity be "fairly debatable, the legislative judgment must be allowed to control".' Plaintiffs bear the burden of overcoming this presumption and the burden of proof on the alleged conflicts issues. (See *Id.* at [p.] 293.)

"3. The Court of Appeal held '[p]artial inconsistency with portions of a general plan or state law will not alone suffice to render a numerical growth control ordinance invalid.' (*Id.* at [p.] 290.)

"4. 'Substantial compliance with State law is the test applicable to [Prop. A]. The question of substantial compliance is one of law. . . . ' (*Ibid.*)

"5. 'No state preemption precluding enactment of [Prop. A] is present in the field.' (*Id.* at [p.] 295.)"

Since at least 1930, the "modern view" has been that the doctrine of the law of the case should not be adhered to when its application results in a manifestly unjust decision. (*Standard Oil Co. v. Johnson* (1942) 56 Cal.App.2d 411, 415, citing *United Dredging Co. v. Industrial Acc. Com.* (1930) 208 Cal. 705, 712.) " *'[W]here the controlling rules of law have been altered or clarified in the interval between the first and second appeal and adherence to the previous decision would result in defeating a just cause, it has been held that the court will not hesitate to reconsider its prior determination.* [Citations.]' " (*Standard Oil Co. v. Johnson, supra,* at pp. 415-416, original italics.)

In light of this rule, we must consider the extent to which the principles of law applied in our prior opinion have been disapproved or modified by the Supreme Court's discussion of that opinion in *Lesher, supra,* 52 Cal.3d at pages 545 through 547. In *Lesher,* the Supreme Court decided that an initiative measure limiting municipal growth was invalid at adoption because it conflicted, contrary to state law, with the city's existing general plan. The Supreme Court disagreed with two points in the analysis in our prior opinion: First, the Supreme Court disapproved any suggestion that a municipal zoning ordinance which was inconsistent with a city's general plan could be subject to a compliance decree rather than a finding of invalidity. (Although no question of a remedy for an invalid ordinance was reached by the trial court here, the point is important on the general validity analysis.) Another statement by the Supreme Court controls our review of several of the trial court's rulings: The Supreme Court expressly disapproved the prior opinion to the extent that it suggests other than that "[a] city may

not adopt ordinances and regulations which conflict with the state Planning and Zoning Law. [Citations.]" (*Lesher, supra*, 52 Cal.3d at p. 547.) The Supreme Court's statement was based on the following reasoning:

> "Conforming a general plan to an inconsistent growth-control ordinance might also be inconsistent with the legislative policy that each city and each county provide in the general plan for its appropriate share of the regional need for housing. (§ 65302.8.) Under that section, amendment of a general plan to limit the number of housing units to be built annually must be accompanied by findings that justify reduction of housing opportunities in the region." (*Lesher, supra*, 52 Cal.3d at p. 546.)

These statements in *Lesher, supra*, 52 Cal.3d 531 undermine the validity of the prior opinion's statements that "partial inconsistency with portions of a general plan or state law will not alone suffice to render a numerical growth control ordinance invalid" (*Building Industry, supra*, 211 Cal.App.3d at p. 290), and also suggests that this court erred in stating "substantial compliance with state law is the test applicable to Prop. A." Further, it seems our statement that "no state preemption precluding enactment of [Prop. A] is present in the field" (*Id.* at p. 295) was too broad, as it is now clear that growth control ordinances may not conflict with state planning and zoning laws.

Next, as to the trial court's conclusion that our prior opinion precluded any relitigation of the claims that Prop. A is facially inconsistent with the PFME or the specified Government Code sections, another aspect of the doctrine of the law of the case must be considered:

> "[L]aw of the case consists in the propositions of law actually decided and applicable to the facts in judgment. It only applies when, upon a subsequent trial, the issues and facts found remain substantially the same, and has no application where the facts alleged and found are materially different from those considered on a former appeal. [Citation.] The doctrine is applied only to the principles of law laid down by the court on appeal as applicable to a retrial of fact. [Citation.] Insofar as the former decision related to the effect of the evidence or the findings on the former trial there can be no application of the doctrine until the facts have been elicited on a retrial. The doctrine not only does not apply to new and additional evidence, it does not apply when explanation of previous evidence appears in the later trial. [Citation.]" (*Weightman v. Hadley* (1956) 138 Cal.App.2d 831, 841.)

With this rule in mind, we return to the prior opinion to determine what it actually decided. The prior opinion consisted of a denial of petitions for writ of mandate which sought to compel the superior court to grant motions for summary judgment or adjudication brought by BIA and Del Oro, which would have invalidated Prop. A. This court upheld the trial court's determination that triable issues of fact remained before the question could be resolved whether there is facial inconsistency between Prop. A and the City's general plan or state law. We explained that the matter of conflict between a growth control ordinance and state law or a general plan "cannot be determined without reference to facts relating to a local entity's compliance with its obligation to meet its share of regional housing needs." (*Building Industry,*

supra, 211 Cal.App.3d at p. 284.) In discussing the various arguments made by BIA and Del Oro, this court consistently emphasized that factual determinations remained to be made before it could be decided whether the ordinance accomplished a reasonable accommodation of competing interests. (*Id.* at p. 293.)

Even when we considered BIA's 12 asserted conflicts with state law and/or the general plan, we were unable to determine the merit of the arguments "without reference to established facts." (*Building Industry, supra,* 211 Cal.App.3d at p. 294.) Although we went on to demolish one of the arguments specifically, it was not one of the same arguments raised in this proceeding. (*Id.* at pp. 294-295, discussing the findings requirement of § 65589.5.) Similarly, although we stated at page 297 of the prior opinion, "It is readily apparent in the case before us that there is present no clear invalidity of [Prop. A] due to inconsistency with the general plan," we went on to state that "factual determinations need to be made before the question of inconsistency can be resolved." (*Building Industry, supra,* at p. 297.) Thus, we are unable to agree with the trial court that this court expressly or finally rejected BIA's claims that there was facial inconsistency between the three asserted Government Code sections, section 65008, section 65913.1, or section 65915, or the PFME of the City's general plan. Instead, those conclusions were preliminary on that record, which we said lacked essential factual determinations before any such conflict ruling could be made.

II
Conflict of Prop. A with the General Plan or State Law

A
Introduction

The above law of the case analysis does not end our inquiry. Our task now is to decide whether on the facts as now established by the trial court, Prop. A meets the standards set out by *Lesher, supra*, 52 Cal.3d 531 regarding conflict of a zoning or planning ordinance with either a City's general plan or the state Zoning and Planning Law. (§ 65000 et seq.)[10] First, to reiterate the statements in *Lesher* concerning conflict of a zoning ordinance with a general plan, such an ordinance is "invalid at the time it is passed. [Citations.] The court does not invalidate the ordinance. It does no more than determine the existence of the conflict. It is the preemptive effect of the controlling state statute, the Planning and Zoning Law, which invalidates the ordinance." (*Lesher, supra*, 52 Cal.3d at p. 544.) The Planning and Zoning Law, in this context, requires adoption and maintenance of a city's general plan. (§ 65300 et seq.; *Lesher, supra*, at pp. 538-539.) Under section 65860, county or city zoning ordinances must be consistent with the entity's general plan, such that "[t]he various land uses authorized by the ordinance are compatible with the objectives, policies, general land uses, and programs specified in such a plan." (§ 65860, subd.

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[10] In *Lesher*, the Supreme Court held that the growth control initiative before it regulated land use, on its face, and as such, was equivalent to a zoning ordinance. (*Lesher, supra*, 52 Cal.3d at pp. 541, 544.) Here, the parties do not dispute that Prop. A is in the nature of a zoning ordinance.

(a) (ii).) "Only the general plan in effect at the time the ordinance is adopted is relevant in determining inconsistency." (*Lesher, supra,* at p. 545.)

Moreover, "[a] city may not adopt ordinances and regulations which conflict with the state Planning and Zoning Law. [Citations.]" (*Lesher, supra,* 52 Cal.3d at p. 547.) The specific statutory arguments BIA raises concerning sections 65008, 65913.1, and 65915 fall into this category, and the issue is essentially preemption. Article XI, section 7 of the California Constitution allows counties and cities to make and enforce within their limits "all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." In our prior opinion, we recognized that local growth control legislation is not generally preempted, impliedly or expressly, by statute. (*Building Industry, supra,* 211 Cal.App.3d at pp. 295-296.) However, due to the numerous factual issues then remaining unresolved, we could not and did not rule upon the specific statutory arguments raised here concerning the effect of Prop. A, as implemented and as forecasted.

B

Factual Analysis

As explained in the prior opinion, the crux of the issue was whether in light of facts relating to the local entity's compliance with its obligation to meet its share of regional housing needs, there was conflict between a numerical growth control ordinance and state law or a general plan. (*Building Industry, supra,* 211 Cal.App.3d at p. 284.) In the trial in this matter, the court made certain

findings, which we now summarize, regarding the City's compliance with its obligation to meet its share of regional housing needs. In Phase I, the trial court made a finding that for the 1986-1991 housing period, the City had met its regional share of new residential housing units (considering all income categories). For both the 1991-1996 period and the 1996-2000 period, it was projected to do so also.[11] The court emphasized that for the 1986-1991 housing period, the City had met and exceeded its regional share *for lower/moderate income categories.* However, since some of those units were attributable to pre-Prop. A permits, the court opined that it was too simplistic to say that resolves all the issues; thus, the court looked to post-implementation housing periods. The court reasoned that when Prop. A took full effect in 1988, affordable housing declined, so the next housing period is relevant.

Thus, considering the 1991-96 period (as required by the prior opinion, which allowed projections, and to allow for pre-Prop. A permits), the court noted that only 443 units were approved from Prop. A's adoption in April 1987 through March 1990 in the low income, senior citizen and fourplex categories; the court noted that those are the only low income categories and the City could not place all the blame on developers for avoiding low

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[11] In a footnote in the statement of decision the trial court observes that this portion of the evidence disregards very low income or assisted housing or "fair share" allotment, as it is enough for section 669.5 analysis to consider low and moderate income housing only; BIA did not dispute that issue.

income housing. Moreover, the City's other housing programs had not filled the breach. Because the court found Prop. A will result in insufficient low income housing for its regional share for the *1991-1996 housing period*, it did not deem the meeting of the 1986-1991 requirements to be dispositive.

In Phase II, the trial court was to balance the City's problems and the relationship of Prop. A to those problems, against the quantified adverse effect Prop. A would have on affordable housing, applying that test as of the 1987 adoption date. The *Livermore* criteria (*supra*, 18 Cal.3d at pp. 607-609) were to be used: (a) estimating the probable effect/duration of restriction; (b) identifying the competing interests; (c) determining whether the ordinance is a reasonable accommodation of competing interests. The trial court used the evidence of the implementation of Prop. A from 1987-1990, and also evidence that forecast its effect into the future (through 2000) in order to judge the validity of Prop. A as of its adoption date. This approach was consistent with the theory of our prior opinion concerning the conflict issue.

In the statement of decision, the trial court reemphasized that although in Phase I it had found the City accommodated its regional share of low/moderate income housing for the 1986-1991 period, and the all income total regional share housing requirements will be met through 2000 despite Prop. A, the City could not show the *1991-1996 low/moderate income regional share units would be built*. The court estimated a deficiency of 2,350 low income, senior citizen and fourplex category units for the "current housing period" (meaning 1991-1996.) Prop. A was also found to adversely impact availability of moderate income units for 1991-1996,

although the evidence was not clear as to how much. In light of the probable effect and duration of the restriction, the court found it should give less weight to compliance with *total* regional share than to compliance with the *all income categories* share. The court then engaged in its numerical balancing effort (there was a 33 percent impact in 1991-1996 on the City's regional share of very low/low/moderate income categories; likely the same proportion in 1996-2000) and its analysis of the competing interests or justification for ordinance, which included the previous four years' implementation evidence as to the timing requirement against the adverse effect on low income housing, all over the duration of Prop. A.

The trial court's overall conclusion on the degree of the City's compliance with its obligations to provide low and moderate income regional share units was that its 1986-1991 compliance was not enough, as the court had to go on to the 1991-1996 period to make a complete analysis, and the City could not show it would meet the regional share for low/moderate income units for that period. In the statement of decision for Phase I, the trial court noted that the prior opinion required and allowed it to make projections of the reasonable probability of accommodating regional housing requirements to the year 2000, as part of the ultimate determination of the facts.[12]

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[12] Cf. *Northwood Homes, Inc. v. Town of Moraga* (1989) 216 Cal.App.3d 1197, 1204, fn. 7, where the court cited with evident approval a trial court's comment that " '[i]t would be inappropriate to strike down an initiative on prognostications as to the future given a reasonable difference of opinion as to whether the needs will be met and at least the possibility that [the city's] goals may be altered under its new land use policies.' "

Based on the above, the City is not justified in arguing that the Phase I finding that all areas of housing were accommodated (for 1986-1991) means that the Phase II finding is unsupported (that Prop. A prevented the City from meeting housing needs); the Phase I positive finding deals with 1986-1991, but the Phase II negative finding applies to 1991-1996. Nor is the City justified in contending, as it did at oral argument, that the Phase II findings about the 443 exceptions granted are on a different issue than the issue of whether the overall housing goals were met. As discussed above, the trial court had ample basis to use both the implementation and forecasting evidence to judge the validity of the ordinance as of 1987, its adoption date.

In Phase III, the trial court concluded that even under the low income exemption from Prop. A, developers were discouraged from proposing density bonus units by the operation of Prop. A. (§ 65915.) Even though the City later interpreted the language of Prop. A excluding density bonus projects to lessen that impact, the court noted that the market rate units in any proposed density bonus project would still have to await building permit allocations, which would reduce or eliminate the incentive of the density bonus. The court stated that the recent amendments to the density bonus law had not alleviated that impact of Prop. A, and the new density bonus law as amended sought to create even stronger incentives for the housing needs of low income households. The court went on to find that it was premature to speculate on whether the City might comply with the density bonus law, when no developer proposal was yet before the City planning authorities. The court further stated it was bound by the

prior opinion's discussion that state law did not preempt Prop. A.

Although we have determined it is not necessary to address the issues raised concerning the application of the Evidence Code section 669.5, subdivision (b) balancing test, it is relevant here to note that the City, in its response to the brief filed by amicus curiae, Pacific Legal Foundation and People for Affordable Housing, has agreed that the trial court went too far in speculating how Prop. A might be implemented and in engaging in a numbers test, i.e., the estimation that while some 20,000 persons would be deprived of affordable housing under Prop. A, some 40,000 persons would be benefited by its promotion of a better quality of life. Under the circumstances, we should not place too much weight upon the trial court's application of the balancing test, and instead focus upon the various factual findings that it made for purposes of analyzing any conflict between Prop. A and the general plan or the particular statutes involved.

C

The General Plan

At the time Prop. A was adopted, the general plan had in effect the PFME, which contained a statement of a number of major policies to be served by the plan. In particular, the PFME stated a policy to "[a]void direct controls on the number or location of new housing units to be built, but provide financial incentives for projects where services can be provided to new and old residents at least cost." As previously explained, we do not interpret our prior opinion as making any final determination

on the actual record that there was any clear invalidity of Prop. A due to inconsistency with the general plan. (See *Building Industry, supra,* 211 Cal.App.3d at p. 297.) Now that factual determinations have been made regarding the extent of the City's compliance with its obligation to address regional housing needs, the trial court had the power to reach the merits of that issue. After first reasoning that the law of the case required a finding of no conflict, the trial court ruled that BIA and Del Oro had not shown any conflict of Prop. A with the PFME, as there was no substantial evidence of such conflict. The court reasoned that the PFME had been insufficient to manage the unhealthy growth situation existing at the time Prop. A was adopted. To reach that conclusion, the court discounted the criticisms in the PFME's EIR of a point system to evaluate growth, reasoning that the EIR was not a policy making document, but only informational in nature.

In light of the clear statement in *Lesher, supra,* 52 Cal.3d at p. 544, that a zoning ordinance that conflicts with a general plan is invalid at the time it is passed, and in light of the factual findings that Prop. A adversely affected the availability of low income housing, the only possible finding is that Prop. A does conflict with the City's general plan, specifically the PFME, regarding the imposition of direct controls on the number or location of new housing units to be built. This restriction on land uses is not compatible with the then-existing general plan. (§ 65860, subd. (a)(ii); *Lesher, supra,* at p. 545.)

Although the trial court reasoned that the City had the power to adopt a more restrictive type of growth control than that represented by the PFME, it could not

do so without validly amending the existing general plan. According to the reasoning of *Lesher, supra,* 52 Cal.3d at pages 540-544, general plans cannot be impliedly amended and a zoning ordinance cannot be deemed a general plan amendment without a clear indication that the voters intended to accomplish such an objective when passing the initiative.[13] Moreover, *Lesher* clearly indicates that no compliance decree would be appropriate to bring the conflicting zoning ordinance into compliance with the general plan, as a court may not rescue a zoning ordinance that is invalid *ab initio.* (*Lesher, supra,* at p. 545.) Since the record in this case contains an adequate basis to determine the validity of Prop. A both on its face and as applied up through the time of trial, there is no need for a remand for further proceedings on this issue.[14] Finally,

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[13] We reject the City's theory, newly raised at oral argument, that because the voter information materials stated Prop. A was to "augment" the general plan, Prop. A may be considered to be an implied amendment to the general plan. (*Lesher, supra,* 52 Cal.3d at pp. 539-544; see *DeVita v. County of Napa* (1993) 20 Cal.App.4th 1716 review granted March 17, 1994 (S037642).) There is no clear indication on this record that the voters reasonably interpreted Prop. A as such an amendment.

[14] Although the City contends that any claim of unconstitutionality of Prop. A as applied should be considered premature since no administrative challenges were pursued, the prior opinion remanded the matter for trial and it was never contemplated that the validity issue could not be addressed without any exhaustion of administrative remedies. Moreover, the Supreme Court has held in *State of California v. Superior Court* (1974) 12 Cal.3d 237, 250-251, that a party need not raise challenges to the constitutionality of a statutory measure before an administrative agency operating pursuant to that measure, as a condition of raising that issue in the courts. No exhaustion of remedies was required under these circumstances.

the housing element of Oceanside's general plan states as a policy:

> "ADEQUATE PROVISION OF HOUSING
>
> "Adequate provision for the housing needs of all economic segments of the community is an issue of the highest priority in Oceanside to meet the low income household assistance goals and to protect, encourage and, where feasible, provide low and moderate income housing opportunities within the intent of State policy to address local needs. . . . "

Prop. A does not promote this policy and accordingly must be deemed inconsistent with it. Although we are sympathetic to the goals stated in Prop. A of promoting the quality of life for the citizens of the City, we are bound by *Lesher* to find the ordinance invalid under those standards.

D

Conflict With Statutory Provisions

BIA and Del Oro next assert that Prop. A conflicts with three particular sections in the State Planning and Zoning Law. The text of the sections on which BIA and Del Oro rely is in relevant part, in the version in effect at the adoption of Prop. A in 1987, as follows:

Section 65008, subdivision (c):

> "No city, county or city and county shall, in the enactment or administration of ordinances pursuant to this title, prohibit or discriminate against a residential development or emergency shelter because the development or shelter is

intended for occupancy by persons and families of low and moderate income, as defined in Section 50093 of the Health and Safety Code, or persons and families of middle income."

Section 65913.1:

"[A] city . . . shall designate and zone sufficient vacant land for residential use with appropriate standards . . . to meet housing needs as identified in the general plan . . . 'appropriate standards' shall mean densities and requirements . . . which contribute significantly to the economic feasibility of producing housing at the lowest possible cost given economic and environmental factors, the public health and safety, and the need to facilitate the development of housing for persons and families of low and moderate income. . . . "

Section 65915:

"(a) When a developer of housing agrees to construct at least (1) 25 percent of the total units of a housing development for persons and families of low or moderate income, . . . or (2) 10 percent of the total units . . . for lower income households, . . . a city, . . . shall either (1) grant a density bonus or (2) provide other incentives of equivalent financial value.

". . . .

"(c) . . . 'density bonus' means a density increase of at least 25 percent over the otherwise maximum allowable residential density under the

applicable zoning ordinance and land use element of the general plan. . . . "[15]

In its statement of decision for Phase III of the trial, the trial court interpreted the prior opinion as deciding that there was no facial conflict between Prop. A and any of these sections. As discussed above, we disagree with that characterization of the prior opinion due to the factual determinations which remained for trial at the time the opinion was written. The trial court had another basis for each of its rulings as well: as to section 65008, the court stated Prop. A was neutral as to any particular development project, regardless of whether it was designed for low income or other future residents. As to section 65913.1, the trial court stated that Prop. A did not affect, change, or prohibit rezoning, and that because the evidence showed the housing element goals had been met for low and moderate income housing in 1986 to 1991, and because there was a current surplus of dense housing and available land zoned for small attached units, as well as a low income exemption in Prop. A, there was no substantial conflict between Prop. A and section 65913.1. As to section 65915, the density bonus law, the trial court ruled that even though it found Prop. A discouraged the development of low income housing units which would

---

[15] Neither section 65008, subdivision (c) nor section 65913.1 has been substantially amended since Prop A's adoption date of 1987. However, section 65915 has been amended to expand the definition of low income housing for which a density bonus may be granted, to delete the provisions applying to moderate income households in favor of housing for low and very low income households, and to provide for additional concessions or incentives in addition to density bonuses under certain circumstances. (1989 and 1990 amendments.) (See fn. 8, *ante*.)

be eligible for a density bonus, and even though there was some showing that Prop. A conflicted with density bonus provisions, the trial court did not have to invalidate the low income exemption to Prop. A because by its amended terms section 65915 was not triggered until a developer actually proposed a housing development, thus allowing it to submit a preliminary proposal to which the City must respond with its proposed action to provide the density bonus.

Again, *Lesher, supra,* 52 Cal.3d 531, provides strong guidance for this Court in analyzing the conflicts issue. The Supreme Court disapproved the prior opinion to the extent that it suggests that a city may adopt ordinances and regulations which conflict with the state Planning and Zoning Law. (*Lesher, supra,* at p. 547.) The Supreme Court's action undercuts the statement in the prior opinion that "[a]pparent partial inconsistency with portions of a general plan or state law will not alone suffice to render a numerical growth control ordinance invalid." (*Building Industry, supra,* 211 Cal.App.3d at p. 290.) It also suggests that "substantial compliance" with state law is too lenient a test to apply to zoning and land use control ordinances. (*Id.* at p. 291.) We should thus look at the question of conflict between Prop. A and these provisions in light of the facts established by the trial court on the issue of the City's compliance with its obligation to meet its share of regional housing needs. (*Id.* at p. 284.)

The trial court made key findings that since Prop. A took effect in 1988, affordable housing in the City had dramatically declined. Only 415 total low income and senior citizen units had been excepted from the effect of Prop. A in the period between 1987 and 1990, and they

were all in the senior category (plus an additional 28 units in the similar fourplex category). Based on those figures, the trial court made an estimate that some 20,000 persons would be denied affordable housing based on the effect of Prop. A. The trial court expressly found that the exception allowing higher priced units on 10,000 square foot lots was not justified by an asserted imbalance in the current housing stock, such that higher end units were needed in the City. As explained above, the trial court's overall conclusion on the degree of the City's compliance with its obligations to provide low and moderate income regional share units was that its 1986-1991 compliance was not enough, as the court had to go on to the 1991-1996 period to make a complete analysis, and the City could not show it would meet the regional share for low/moderate income units for that period.

In Phase III, the court further ruled that the evidence showed developers were discouraged from proposing housing that qualified for density bonuses, due to the exclusion of density bonus units from the low income and senior exception. This exclusion, it held, conflicted with the state density bonus law.

However, it declined to invalidate the ordinance on that ground, using the theory that section 65915 had not been shown to have been triggered by a developer's specific proposal of a density bonus project.[16]

---

[16] In opposition to BIA's argument as to a conflict between Prop. A and section 65913.1, the City has made a request for judicial notice of a document showing that the State Department of Housing and Community Development found that the City's housing element of its general plan was adequate and identified

The three cited Government Code sections, taken together, clearly show an important state policy to promote the construction of low income housing and to remove impediments to the same. Prop. A is such an impediment, and cannot survive such a conflict. Although the City has made efforts to implement a policy to mitigate the harshness of the exemption of density bonus projects from the exception in Prop. A for low income or senior citizen housing, those efforts do not change the text of the initiative measure. We also find the trial court's hypertechnical reasoning that the density bonus law had not been triggered as of the time of trial to be unpersuasive in light of the clear facial conflict between Prop. A and the density bonus law, and the very low number of low income or senior citizen allocations which were made between 1987 and 1990.

Similarly, when the trial court made its finding that Prop. A did not offend against the provisions of section 65008, subdivision (c), prohibiting discrimination against low income housing, because Prop. A was neutral as to the intended occupants of any development, it disregarded its own factual findings that affordable housing

---

adequate sites for its share of the regional housing need. (Evid. Code, §§ 452, 459.) BIA has requested that this document be stricken from the record as representing a post-judgment matter which is irrelevant to the issues presented. (*People's Home Sav. Bank v. Sadler* (1905) 1 Cal.App. 189, 193.) Since judgment was entered in the BIA action December 24, 1991, and the Housing and Community Development letter approving the draft housing element revisions was not sent until August 19, 1992, it appears that BIA's objection is well taken and we have not considered that document in connection with deciding this appeal.

had taken a dramatic decline since the effective date of Prop. A. Prop. A acts to favor the development of larger units on larger lots, with more design and other amenities, through the exemption for 10,000 square foot lots. The City admitted as much, while asserting that such an exemption was needed in order to remedy an imbalance in the current housing supply. The trial court was not persuaded by that argument in Phase I, and we are not persuaded by it at all.

Finally, with respect to the asserted conflict between Prop. A and section 65913.1, the trial court ruled that Prop. A did not affect, change, or prohibit rezoning, even though the prior opinion declined to disturb the trial court's ruling that Prop. A was a zoning ordinance for some purposes. *Lesher* characterized a growth control ordinance regulating land use as "resembling" a zoning ordinance, and treated it like one. (*Lesher, supra,* 52 Cal.3d at p. 541.) We fail to see how Prop. A, as a zoning ordinance, can be said to comply with standards contributing to the economic feasibility of producing lowest possible cost housing, in light of the limited exceptions to the allocation system of Prop. A for low income or senior housing. Since the trial court found the City was unlikely to meet its low income housing goals through the year 2000, as a result of Prop. A, a facial conflict with section 65913.1 and Prop. A is apparent.

E

Conclusion

Further proceedings to develop additional factual background on the conflict issue are unnecessary. Where

there is a lack of substantial evidentiary dispute about the facts underlying a question of statutory interpretation, the proper interpretation of statutory language is a question of law which an appellate court may review de novo, independent of the trial court's ruling or rationale. (*Los Angeles County Safety Police Assn. v. County of Los Angeles* (1987) 192 Cal.App.3d 1378, 1384.) The facial conflict of Prop. A with these three sections stating state housing policy may be determined as a matter of law. (See § 65580, subd. (a), making the legislative finding as to housing elements that "[t]he availability of housing is of vital statewide importance, and the early attainment of decent housing and a suitable living environment for every California family is a priority of the highest order"; also, the Legislature recognized that cooperation between government and the private sector would be necessary to accommodate the housing needs of Californians of all economic levels. (§ 65580, subd. (b).)) Prop. A must be considered invalid as of the date of its adoption.

We find support for our conclusion that Prop. A is in conflict with state housing policy as expressed in the state Planning and Zoning Law (sections as cited) in *Livermore, supra,* 18 Cal.3d at page 602. There, the Supreme Court distinguished the growth control ordinance which it was declining to strike down by way of strict judicial scrutiny (of whether the municipality had a compelling interest in the subject of the ordinance) from those exclusionary land use ordinances "which ban or limit less expensive forms of housing while permitting expensive single family residences on large lots." (*Ibid.*) The Supreme Court explained "[t]he Livermore ordinance is not made from this mold; it impartially bans all residential construction,

expensive or inexpensive." (*Ibid.*) The City's Prop. A does not have the same across-the-board effect, and *Livermore* does not permit that we uphold it. We accordingly reverse the judgment with directions to enter a different judgment in accordance with the principles of this opinion.

DISPOSITION

The judgment is reversed with directions to enter judgment in favor of BIA on the grounds that Prop. A impermissibly conflicts with the City's general plan and with Government Code sections 65008, 65913.1, and 65915. Each party to bear its own costs.

/s/ Huffman
HUFFMAN, Acting P.J.

WE CONCUR:

/s/ Froehlich
FROEHLICH, J.

/s/ Nares
NARES, J.

APPENDIX C

Fourth Appellate District, Division One,
No. D017139 S045265

IN THE SUPREME COURT OF CALIFORNIA

DEL ORO HILLS, Appellant

v. (Filed Apr. 20, 1995)

CITY OF OCEANSIDE, Respondent

Appellant's petition for review DENIED.

Mosk, J. and Arabian, J. are of the opinion the petition should be granted.

The request for an order directing depublication of the opinion is denied.

Lucas
Chief Justice

APPENDIX D

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

BUILDING INDUSTRY ASSOCIATION OF SAN DIEGO, etc., Plaintiff, vs. CITY OF OCEANSIDE, et al., Defendant.	Case No. N37638 Consolidated with Case No. N37196
DEL ORO HILLS, etc., Plaintiff, vs. CITY OF OCEANSIDE, etc., Defendant.	STATEMENT OF DECISION AND ORDER (Filed Aug. 6, 1991)

This matter came before this Court on February 6, 1991, for the second phase of a bifurcated trial. Plaintiffs were represented at trial by DONALD R. WORLEY, Esquire, and JOSEPH SOLOMON, Esquire, and Defendant was represented by KATHERINE E. STONE, Esquire, and J. ROGER MYERS, Esquire.

The Court after having heard and considered the evidence presented at trial on February 6, 7, 8, 11 and 13, 1991, and the

* * *

[p. 18] set forth in the "issue paper."[14] However, it is clear that in the areas of (1) traffic and transportation, (2) sewers, (3) water, (4) police, (5) fire, (6) drainage, and (7) parks, the "issue paper" certainly calls into question the City's argument that its infrastructure deficiencies were glaring at the time Prop. A was passed.

BIA also provided the Court with excerpts from pre-trial depositions taken of two City officials[15] responsible for specific infrastructures which support its position that the City's infrastructures were in reasonably good shape. In addition, the City Planner, Michael Blessing, made several similar statements during pre-trial depositions (T III, p. 58, lines 6-10; page 64, lines 18-20).

The Court believes that, in some respects, the City has taken a "shotgun approach" in describing the claimed "real and substantial" problems relating to health, safety and welfare which existed when Prop. A was passed. Nevertheless, it must be remembered that the "real and substantial" test relating to health, safety and welfare includes both present and *reasonably anticipated* problems. BIA has certainly inflicted substantial damage to the City's case of present infrastructure problems when Prop. A was passed. However, even BIA concedes that a 5% annual growth rate existed in Oceanside in 1987 which would be the equivalent to 60%

---

[14] BIA highlights of the "issue paper" are set forth in its Post-Trial Brief at pages 9-15.

[15] See Depositions of City Engineers Backman (Ex. 241) and Turner (Ex. 241).

* * *

[p. 24] to control the rate, timing and sequencing of residential development, is more than reasonably related to remedy the identified health, safety and welfare problems advanced by the City as a result of the unhealthy growth situation existing in 1987.

The stated objectives of Prop. A can easily be voiced as an attempt to remedy the City's health, safety and welfare problems. The Court believes that the more important prong of the justification issue is whether Prop. A is reasonably designed to support the stated objectives and remedy the identified problems.

The Court has concluded that the best way to review the above issue is to analyze BIA's arguments against Prop. A in this justification area. BIA first asserts that Prop. A was never designed to "control growth" and, as such, it is not reasonably related to solving growth-related problems of the City. Planning Director Michael Blessing admitted in the trial of Phase One that Prop. A was expected to produce an average of about 1,800 residential units per year. Dennis Martinek, one of the authors of Prop. A, testified that Prop. A was expected to produce more housing permits annually than the City's historic rate (T I, pages 81-82). BIA points out that from 1977 to 1986 the City issued housing permits at an average annual rate of 1,682 residential units. (See Attachment B to BIA's Post-Trial Brief.) Thus, BIA argues that Prop. A was designed to accommodate more units than the average of the ten previous years. In actuality, BIA claims that the City's expectations were grossly understated since the number of units authorized under Prop.

A in the period 1987-1989 were 2,683, 3,237 [p. 25] and 2,597 (Trial Ex. 13A).[20]

The City responds by claiming that BIA has misconstrued Trial Ex. 155(A) to highlight an average residential units [sic] during 1977-1986 at 1,682. The City contends that if one looks to the average number of units during the 1983-1986 period, the numbers increase dramatically:

1983-1986 – Average Number of Single Family Units/Year	1,203.67
1983-1986 – Average Number of Multifamily Units/Year	1,179.67
TOTAL	2,383.34

The Court agrees with the City to the extent that the 1983-1986 period represents the highest consecutive three-year average for the entire 1977-1986 period. (See Trial Ex. 155A.)

In the final analysis, the fact that under Prop. A slightly more residential units were approved than in the preceding three years cannot be accorded much significance. The Court believes that in the early years of a new land use regulation, the City Council might need some reasonable time to become familiar with, and learn how to apply the same. It is also true that for the calendar year 1987 Prop. A authorized a maximum allotment of 1,000

---

[20] The Court ruled that evidence of the implementation of Prop. A during the past four (4) years was circumstantially relevant in a determination of whether Prop. A was reasonably designed to accomplish its stated objectives. See BIA brief on Relevancy of Evidence filed on February 22, 1991, pages 4-9.

units, which was 200 more units than allotted for the remaining period of Prop. A.

Finally, an increase in approved residential units between 1987-1989 does not necessarily mean that the City did not properly

* * *

APPENDIX E

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

BUILDING INDUSTRY ASSOCIATION OF SAN DIEGO, ET AL.,	FROM SAN DIEGO COUNTY
PLAINTIFF AND APPELLANT,	HON. HERBERT B. HOFFMAN, JUDGE
VS.	SUPERIOR COURT N 37638
CITY OF OCEANSIDE, ET AL.,	
DEFENDANT AND RESPONDENT.	DCA: NO. DO16581

REPORTER'S APPEAL TRANSCRIPT
VOLUME VII
PAGES 809 THROUGH 904

(Filed Aug. 3, 1992)

APPEARANCES:

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SAN DIEGO, CA 92101-4245

FOR THE DEFENDANTS AND RESPONDENT:
FREILICH, STONE, LEITNER & CARLISLE
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(APPEARANCES CONTINUED) DUPLICATE ORIGINAL

[p. 867] INTO CONSIDERATION AND PROJECT REVIEW BEFORE THE ADOPTION OF PROPOSITION "A"?

A YES.

THE COURT: DO YOU MEAN WITH RESPECT TO WHETHER THEY WOULD ISSUE A "B" PERMIT OR NOT?

THE WITNESS: NO. WITH RESPECT TO THE INITIAL APPROVAL OF A TENTATIVE MAP DEVELOPMENT STAGE, GOING OVER THE ACTUAL PICTURES OF THE BUILDING AT THE PLANNING COMMISSION LEVEL, IN THAT ASPECT.

THE COURT: ALL RIGHT.

BY MR. WORLEY:

Q AND THAT SINCE THE MID 1980'S THERE WAS A MOVE IN THE CITY, IMPLEMENTED BY YOUR DEPARTMENT, TO GENERALLY IMPROVE THE QUALITY OF THE HOUSING DEVELOPMENT TO OCCUR IN THE CITY OF OCEANSIDE BEFORE PROPOSITION "A" WENT INTO EFFECT?

A YES. ALL – ALL DEVELOPMENT, ACTUALLY.

Q NOW, AS PLANNING DIRECTOR, YOU DID NOT PERCEIVE ANY PARTICULAR PROBLEMS THAT AROSE FROM THE RATE OF GROWTH IN THE THREE YEARS BEFORE PROPOSITION "A", DID YOU?

A NOT THAT – THAT I, YOU KNOW, DIRECTLY TOOK AN ISSUE TO THE CITY COUNCIL ON, OR ANYTHING ON THAT QUESTION. WE HAD, YOU KNOW, ONGOING AND WORKING THE LAND USE ELEMENT ISSUE, WHICH TOUCHES THAT ISSUE SIGNIFICANTLY. THE COMMUNITY FACILITIES ELEMENT WORK PROGRAM TOUCHES THAT ISSUE SIGNIFICANTLY. AND IT WAS IN RESPONSE, IN GENERAL, TO – TO, I THINK, CLEARLY SOME INFLUENCES, BOTH ON STAFF AS WELL AS THE POLICY-MAKERS, ABOUT THE RATE OF GROWTH IN THE CITY AS THEY WERE [p. 868] VISUALLY SEEING IT HAPPEN.

Q OKAY.

YOU RECALL THAT I DID TAKE YOUR DEPOSITION ON MANY STAGES, AS MS. STONE REMINDED ME; IS THAT SO?

A YES.

Q LET ME SHOW YOU VOLUME 2 OF THE DEPOSITION THAT WAS TAKEN ON JULY 25TH, 1988.

A OKAY.

Q THAT WAS ABOUT TWO-AND-A-HALF YEARS AGO, WAS IT NOT?

A YES.

Q YOUR RECOLLECTION OF EVENTS WAS BETTER TWO-AND-A-HALF YEARS AGO THAN TODAY, ISN'T IT?

A YES.

Q LET ME ASK YOU TO READ TO YOURSELF THE QUESTION THAT BEGINS ON PAGE 198, LINE 23, AND CONTINUING TO TO [sic] PAGE 199, LINE 3.

(PAUSE)

Q HAVE YOU READ IT?

A YES.

Q AND DID I ASK YOU THAT QUESTION, AND DID YOU ANSWER THE QUESTION THE WAY IT WAS? "YES" OR "NO"? "YES" OR "NO"?

IS THAT A CORRECT REPORTING OF THE QUESTION AND ANSWER AT THAT DEPOSITION?

A YES.

MR. WORLEY: YOUR HONOR, IF I MAY READ IT INTO THE RECORD?

THE COURT: YES.

[p. 869] MR. WORLEY:

"Q OKAY. DID YOU OBSERVE – AS THE PLANNING DIRECTOR, DID YOU OBSERVE ANY PARTICULAR PROBLEMS THAT AROSE FROM THAT RATE OF GROWTH IN THE THREE YEARS PRIOR TO JANUARY 1ST, 1987?

"A I DIDN'T PERCEIVE ANY PARTICULAR PROBLEMS, NO."

Q WERE YOU ALSO NOT OF THE OPINION, MR. BLESSING, THAT GROWTH WAS NOT AFFECTING THE HEALTH, SAFETY, AND WELFARE OF THE CITIZENS OF OCEANSIDE TO A SIGNIFICANT DEGREE PRIOR TO PROPOSITION "A"?

A IF YOU ARE GOING TO SAY THAT MY DEPOSITION SAYS I SAID THAT, MR. WORLEY, THEN I WILL SAY I SAID THAT STATEMENT AT THE TIME. AND IT IS A CONTEXTUAL ISSUE FOR THOSE DEPOSITIONS, I THINK IS – IS NECESSARY.

Q WOULD YOU LIKE TO SEE YOUR DEPOSITION?

DO YOU THINK YOU DID NOT SAY IT?

A IT – I AM PERCEIVING THAT YOU ARE, IN FACT, QUOTING ME IN THE PAGES IN THERE. AND IF YOU WISH TO QUOTE THOSE PAGES AND SAY THAT I SAID THAT, I WILL AGREE WITH YOU. I SAID THAT IN 1988 OR 1989 – OR 1989, WHEN WE DID THE SERIES OF DEPOSITIONS.

Q THAT WAS, INDEED, A STATEMENT OF YOUR OBSERVATIONS AT THAT TIME? YOU TRULY BELIEVED IT WHEN YOU TOLD ME THAT?

A I AGREE THAT THE STATEMENT – IF IT'S IN MY DEPOSITIONS THERE, YES. AND THE CONTEXT WITH WHICH FIVE VOLUMES ARE THERE, TOO, I THINK ARE RELEVANT.

[p. 870] Q LET'S TAKE A LOOK AT IT.

READ FROM PAGE 218, LINE 3 DOWN TO LINE 15.

A THE QUESTION WAS, THAT YOUR OBSERVATION –

Q NO. NO. NO. I'M SORRY, MR. BLESSING, JUST READ IT TO YOURSELF.

A OKAY.

Q MS. STONE, I AM SURE WILL INTERPOSE AN OBJECTION.

(PAUSE)

A I HAVE READ IT.

Q WERE THOSE QUESTIONS AND YOUR ANSWERS GIVEN AS REPORTED IN THE DEPOSITION TRANSCRIPT?

A YES.

MR. WORLEY: YOUR HONOR, I NOTE, FIRST, THERE WAS AN OBJECTION AT THE TIME FOR LACK OF FOUNDATION AND, I SUPPOSE, OPINION. BUT HE HAS BEEN TESTIFYING AS TO HIS OPINION THROUGHOUT THE TESTIMONY AND HIS DECLARATION.

I WOULD LIKE TO READ IT INTO THE RECORD.

"QUESTION" –

MS. STONE: WHAT IS THE PURPOSE OF READING IT INTO THE RECORD? YOU HAVE NOT ASKED HIM A QUESTION.

MR. WORLEY: I DID ASK A QUESTION. HE – HE DIDN'T REMEMBER.

THE COURT: GO AHEAD.

MR. WORLEY:

"Q WAS IT YOUR OBSERVATION AT THE END OF 1986, AS THE PLANNING DIRECTOR OF THE CITY OF OCEANSIDE, THAT GROWTH WAS ADVERSELY EFFECTING THE HEALTH, SAFETY, AND WELFARE [p. 871]

"OF THE CITIZENS OF THE CITY OF OCEANSIDE?

"MISS FOX:"

WHICH IS RELATED TO MS. STONE – "OBJECTION: LACKS FOUNDATION. CALLS FOR AN AREA OUTSIDE THE EXPERTISE OF THIS WITNESS."

"A I DON'T HAVE A COMMENT.

"BY MR. WORLEY:

"Q WHAT IS YOUR ANSWER, MR. BLESSING?

"MISS FOX: DO YOU NEED THE QUESTION AGAIN?

"THE WITNESS: YEAH. GIVE ME THE QUESTION, AGAIN.

"(NEXT TO LAST QUESTION READ)

"THE WITNESS: NOT TO A SIGNIFICANT DEGREE. NO."

BY MR. WORLEY:

Q WAS IT ALSO YOUR OBSERVATION AT THAT TIME, IN THE PRE PROPOSITION "A" TIME, THAT THE RATE OF GROWTH WAS NOT AFFECTING THE CAPACITY OF STREETS WHEN CONSIDERED IN CONJUNCTION WITH THE ROAD SYSTEMS THAT WERE ADDED AS CONDITIONS TO PROJECTS AND THE MAJOR SYSTEMS THAT WERE ON-LINE?

A THAT WOULD HAVE BEEN A STATEMENT I – I WOULD HAVE SAID WITH RESPECT TO WHETHER OR NOT WE WOULD ULTIMATELY GET THOSE FACILITIES.

Q IT WAS ALSO YOUR OBSERVATION AT THE TIME OF THE TAKING OF THAT DEPOSITION THAT IN THE PRE PROPOSITION "A" PERIOD, THAT SERVICES WERE PROPERLY AND - WERE BEING PROPERLY AND EFFECTIVELY STAGED IN A MANNER WHICH WOULD NOT OVER-EXTEND FACILITIES; WASN'T THAT YOUR OBSERVATION?

A I CAN - COULD RECALL MAKING THAT STATEMENT IN THE [p. 872] CONTEXT AS WE HAVE JUST DISCUSSED IN THE LAST COUPLE OF MINUTES.

Q OKAY.

WAS IT ALSO YOUR OBSERVATION AT THE TIME THE DEPOSITION WAS BEING TAKEN IN THE PRE PROPOSITION "A" PERIOD, OCEANSIDE WAS NOT A DUMPING GROUND FOR POORLY PLANNED DEVELOPMENT?

A WAS IT?

Q IT WAS NOT - IT WAS YOUR OBSERVATION THAT OCEANSIDE WAS NOT A DUMPING GROUND FOR POORLY PLANNED DEVELOPMENT?

I WOULD HOPE - HOPE YOU STILL HAVE THAT OBSERVATION.

A THAT IS A CORRECT OBSERVATION.

Q OKAY.

AND OCEANSIDE, IN THE PRE PROPOSITION "A" PERIOD, WAS NOT EXPERIENCING RUN-AWAY GROWTH?

A I'M SURE THAT I SAID THAT THEN, TOO.

Q YOU WOULD NOT CHARACTERIZE THE PARKS AS BEING OVER CROWDED?

A YES.

THE COURT: HOW MUCH LONGER DO YOU THINK YOU WILL BE, MR. WORLEY?

MR. WORLEY: A VERY SHORT TIME, YOUR HONOR. I WANT TO DOUBLECHECK THAT I HAVE COVERED THE POINTS I NEED TO COVER.

(PAUSE)

BY MR. WORLEY:

Q IT IS ALSO YOUR VIEW AT THE TIME, MR. BLESSING,

* * *

Supreme Court, U.S.
FILED
JUL 25 1995
OFFICE OF THE CLERK

No. 94-2112

In the

Supreme Court of the United States

October Term, 1994

DEL ORO HILLS,
Petitioners,

v.

CITY OF OCEANSIDE,
Respondents.

Petition for a Writ of Certiorari to the California Court of Appeal for the Fourth Appellate District

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR CERTIORARI FILED BY PETITIONER DEL ORO HILLS

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28 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

REASONS FOR GRANTING
THE PETITION FOR CERTIORARI 4

I. THE OPINION OF THE COURT OF APPEAL CONTRADICTS WELL-ESTABLISHED PRINCIPLES OF TAKINGS LAW 4

II. CONFUSION PREVAILS AMONG STATE COURTS AND FEDERAL CIRCUIT COURTS REGARDING THE CORRECT APPLICATION OF THE TWO-PRONG AGINS TEST . . . 10

A. Some Courts Properly Apply the Disjunctive Test 10

B. Some Courts Confuse Agins and Embrace a Conjunctive Test 12

C. A Few Courts Have Adopted What Can Best be Described as an Exclusive Substantive Due Process/Effective Conjunctive Test 13

D. Application of a Nonexclusive Substantive Due Process Standard Allows the Use of Both a Substantive Due Process and a Takings Analysis 15

Page

E. A "Balancing" Test Applied by Some Courts Subsumes or Ignores the Two-Prong Agins Test 17

F. Other Courts Use Second Prong Takings Analysis Exclusively, Calling the First Prong Irrelevant 18

CONCLUSION 20

TABLE OF AUTHORITIES CITED

Page

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Page

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42 F.3d 1257 (9th Cir. 1995) 15-16

Jackson Court Condominiums, Inc. v.
City of New Orleans,
874 F.2d 1070 (5th Cir. 1989) 5

Kaiser Aetna v. United States,
444 U.S. 164 (1979) 5

Kelly v. Tahoe Regional Planning Agency,
855 P.2d 1027 (Nev. 1993) 10

Keystone Bituminous Coal Association v.
DeBenedictis, 480 U.S. 470 (1987) 2,4

Loveladies Harbor v. United States,
28 F.3d 1171 (Fed. Cir. 1994) 18

Lucas v. South Carolina Coastal Council,
304 S.E.2d 895 (S.C. 1991) 8

Lucas v. South Carolina Coastal
Council, 505 U.S. __,
120 L. Ed. 2d 798 (1992) 2,4,7-8,18-19

Manocherian v. Lenox Hill Hospital,
643 N.E.2d 479 (N.Y. 1994) 11-12

Page

McAndrews v. Fleet Bank of Massachusetts,
989 F.2d 13 (1st Cir. 1993) 17-18

McDougal v. County of Imperial,
942 F.2d 668 (9th Cir. 1991) 5,10

Miller v. Columbia River Gorge Commission,
848 P.2d 629 (Or. Ct. App. 1993) 10-11

Moore v. City of Costa Mesa,
886 F.2d 260 (1989), cert. denied,
496 U.S. 906 (1990) 18

Nollan v. California Coastal
Commission, 177 Cal. App. 3d 719 (1986) 7

Nollan v. California Coastal
Commission, 483 U.S. 825 (1987) . . . . . *passim*

Northern Illinois Home Builders
Association, Inc. v. County of Du Page,
649 N.E.2d 384 (1995) 5

Penn Central Transportation Co. v.
New York City, 438 U.S. 104 (1978) 17-18

Pennell v. City of San Jose,
485 U.S. 1 (1988) 4

Reahard v. Lee County, 968 F.2d 1131
(11th Cir. 1992) 18-19

San Diego Gas & Electric Co. v. City of
San Diego, 450 U.S. 621 (1981) 4

Schultz v. City of Grants Pass,
884 P.2d 569 (Or. Ct. App. 1994) 5,11

Page

Seawall Association v. City of New York,
542 N.E.2d 1059 (N.Y. 1989) 10-11

Southview Association, Ltd. v. Bongartz,
980 F.2d 84 (2d Cir. 1992), cert. denied,
__ U.S. __, 123 L. Ed. 2d 153 (1993) 15

United States v. Riverside Bayview
Homes, Inc., 474 U.S. 121 (1985) 4

Whitehead Oil Co. v. City of Lincoln,
515 N.W.2d 401 (Neb. 1994) 5,11

Whitney Benefits, Inc. v. United States,
926 F.2d 1169 (Fed. Cir. 1991) 5

Woodbury Place Partners v. City of Woodbury,
492 N.W.2d 258 (Minn. Ct. App. 1993),
cert. denied, ___ U.S. __,
124 L. Ed. 2d 679 (1993) 18

Yee v. City of Escondido, 503 U.S. ___,
118 L. Ed. 2d 153 (1992) 2,4-5

RULES

Supreme Court Rule 37.3 2

CALIFORNIA CONSTITUTION

California State Constitution,
Art. I, § 19 6

UNITED STATES CONSTITUTION

U.S. Const., Art. V 6

Page

Fifth Amendment 3,15

Fourteenth Amendment 3

No. 94-2112

In the

Supreme Court of the United States

October Term, 1994

DEL ORO HILLS,

Petitioners,

v.

CITY OF OCEANSIDE,

Respondents.

Petition for a Writ of Certiorari to the California Court of Appeal for the Fourth Appellate District

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR CERTIORARI FILED BY PETITIONER DEL ORO HILLS

INTEREST OF AMICUS CURIAE

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating cases affecting the public interest. PLF has over 20,000 contributors and supporters located throughout the country and maintains its principal office in Sacramento, California.

PLF has participated in numerous cases involving issues arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Its attorneys were counsel of record in the landmark United States Supreme Court case *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Lucas v. South Carolina Coastal Council*, 505 U.S. __, 120 L. Ed. 2d 798 (1992); *Yee v. City of Escondido*, 503 U.S. ___ , 118 L. Ed. 2d 153 (1992); *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987). Given its public policy perspective and experience, Pacific Legal Foundation believes it can provide additional insight with respect to the issues before this Court in the present case. Pursuant to Rule 37.3, written permission from all parties to file this brief has been lodged with the clerk of the Court.

SUMMARY OF ARGUMENT

Who is responsible for the injury suffered by a property owner as a result of a local growth control initiative that is subsequently declared to be unlawful. The landowner? Or should the taxpayers who passed the measure and inflicted the injury be required to pay? The answer to this question will follow from this Court's determination of exactly what is the proper standard for determining a regulatory taking.

This Court should grant the petition for writ of certiorari because the decision of the California Court of Appeal directly threatens a central analytical pillar of takings law. It has long been settled that a land use regulation effects a taking in at least two discreet instances: (1) where the regulation fails to substantially advance legitimate government interests; ***or*** (2) where the regulation denies an

owner economically viable use of his land. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). ***Either*** instance is sufficient to trigger a taking under the Fifth and Fourteenth Amendments; these amendments also require governments to pay just compensation for takings. With respect to a regulation that is later declared to be unlawful, because such a regulation fails to substantially advance a legitimate governmental interest, it may result in a taking and compensation would be due--at least for the period of time in which the offending regulation was in effect. *See First English 482 U.S.* at 321.

Surprisingly, the Court of Appeal below rejected this established "either/or" formulation, insisting instead that a landowner satisfy ***both*** elements of the analysis before a taking may be found. This unprecedented departure from bedrock takings principles contradicts virtually every major United States Supreme Court takings decision in the last 15 years, not to mention scores of state and federal court decisions. Worse, it undermines crucial constitutional protections that shield property owners from arbitrary and abusive government regulations.

Despite this Court's disjunctive interpretation of the two-pronged *Agins* test, many lower state and federal courts interpret the *Agins* test in ways that are varied and unpredictable. While the disjunctive interpretation predominates, at least five other implicit and explicit applications of the *Agins* test exist. To resolve the lower courts' confusion in favor of the disjunctive interpretation of the *Agins* test, amicus Pacific Legal Foundation strongly urges this Court to grant the petition for certiorari.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

I

THE OPINION OF THE COURT OF APPEAL CONTRADICTS WELL-ESTABLISHED PRINCIPLES OF TAKINGS LAW

In *Agins v. City of Tiburon*, this Court established the present framework for evaluating regulatory takings claims: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests [citation], ***or*** denies an owner economically viable use of his land [citation]." 447 U.S. at 260 (emphasis added). Expressly stated in the ***dis***junctive, the *Agins* test provides two independent bases on which a taking may be found: a taking arises whenever the government violates *either* prong of the formulation. The independence of each prong of the two-prong *Agins* test has been reiterated by this Court in nearly every major regulatory takings case in the last 15 years.[1]

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[1] *Dolan v. City of Tigard*, 512 U.S. __, 129 L. Ed. 2d 304, 316 (1994); *Lucas v. South Carolina Coastal Council*, 120 L. Ed. 2d at 813; *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. at 485; *Nollan v. California Coastal Commission*, 483 U.S. at 834; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985); *see also Yee v. City of Escondido*, 118 L. Ed. 2d at 169 (restating and providing additional citations for petitioners' first prong argument); *Pennell v. City of San Jose*, 485 U.S. 1, 18 (1988) (Scalia, J., concurring in part; dissenting in part) (restating *Agins* test and noting the independence of its prongs); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 647 (1981) (Brennan, J., dissenting) (restating *Agins* test).

For instance, this Court in *Yee v. City of Escondido* explicitly stated that a claim that a regulation fails to substantially advance a legitimate state interest (*i.e.*, a first prong *Agins* challenge) "***does not depend on the extent to which [the property owners] are deprived of the economic use of their particular pieces of property.***" 118 L. Ed. 2d at 169 (emphasis added); *see also Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979) (these are "entirely separate question[s]"). Numerous state decisions and dozens of federal cases have also recited and relied on the disjunctive *Agins* test.[2]

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[2] Regarding state cases, *see, e.g., Schultz v. City of Grants Pass*, 884 P.2d 569, 573 (Or. Ct. App. 1994) (holding that imposed exaction of land was regulatory taking because exaction did not relate to impact of plaintiffs' proposed development); *Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 401 (Neb. 1994) (holding that arbitrary and capricious government action did not advance legitimate state interest and thus was a regulatory taking); *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E.2d 384, 389 (1995) (adopts *Agins* disjunctive test in reviewing transportation impact fees).

Regarding federal cases, *see, e.g., Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1176 (Fed. Cir. 1991) ("a regulation effects a taking if it ***either*** (1) 'does not substantially advance legitimate state interests,' ***or*** (2) 'denies an owner economically viable use of his land'") (emphasis in original); *McDougal v. County of Imperial*, 942 F.2d 668, 677 (9th Cir. 1991) (reciting the two-prong *Agins* test in the negative voice); *Jackson Court Condominiums, Inc. v. City of New Orleans*, 874 F.2d 1070, 1080 (5th Cir. 1989) (reciting two-prong *Agins* test).

The two-prong *Agins* test can also be phrased in a negative voice with no alteration of its meaning. For instance, in its most recent affirmation of the *Agins* test, this Court in *Dolan v. City of Tigard*, 129 L. Ed. 2d at 316, stated: "A land use regulation ***does not*** effect a taking if it 'substantially advance[s] legitimate state interests' ***and*** does not 'den[y] an owner economically viable use of his land' [citation to *Agins*]." (Emphasis added.) *See also Nollan v. California Coastal Commission*, 483 U.S. at 834 (also stating the *Agins* test in the negative voice). Though the emphasis is somewhat different, the negative voice rendition (no less than the positive voice rendition) makes it perfectly clear that for a land use regulation to pass muster under the Takings Clause, it must substantially advance legitimate state interests ***and*** leave an owner with economically viable use of his property. If either one of these conditions is violated, the government has effected a taking. The taking of property is constitutional only when accompanied by just compensation. U.S. Const., Art. V; Cal. Const., Art. I, § 19.

The opinion below contradicts these well-established principles by denying that either prong of the *Agins* test is sufficient to establish a taking: "[W]e cannot accept Del Oro's theory that satisfaction of one element of the *Agins* test (i.e., that there was an invalid regulation) is enough to establish a taking as a matter of law." *Del Oro Hills*, 31 Cal. App. 4th 1060, 1079 (1995). The Court of Appeal further held:

> In *Nollan*, *Lucas*, and *Dolan*, the United States Supreme Court's analysis of the taking issue inextricably interlinked both the regulation's validity and the question of whether any economically beneficial use of the property remained in light of the regulation. *In light of later authority, Agins did not establish an "either/or" type of test.*

Id. (emphasis added).

This conclusion is patently wrong. And it is flatly contradicted by the very cases the opinion cites.

Nollan v. California Coastal Commission involved an attempt by the California Coastal Commission to exact a public easement from a private property owner as a condition for a permit to build a house. 483 U.S. at 827-28. This Court ultimately struck down the exaction under the first prong of the *Agins* test, *i.e.*, for failing to substantially advance legitimate state interests and thus effecting an unconstitutional taking of property without just compensation. *Id.* at 837 and 841-42. This Court never suggested, however, that the exaction of a simple use easement deprived the Nollans of economically viable use of their property. Quite the contrary, by the time this Court heard the case, the Nollans had already constructed a new house on their beachfront lot. *Id.* at 829-30. More importantly, this Court expressly rejected the opinion of the California Court of Appeal that the Nollans' takings claim was invalid because they had not been deprived of all reasonable use of their property. *Id.* at 830 and 837; *see Nollan v. California Coastal Commission*, 177 Cal. App. 3d 719, 723 (1986). Therefore, the statement by the court below that the issue of "economically beneficial use" was somehow "inextricably interlinked" with the "analysis of the takings issue" in *Nollan* is incorrect. Economically beneficial use was never at issue in *Nollan.*

Lucas v. South Carolina Coastal Council likewise contradicts the notion that both prongs of the *Agins* test must be satisfied before a taking may be found. Whereas *Nollan* was a purely ***first*** prong *Agins* case, *Lucas* was a purely ***second*** prong *Agins* case. In *Lucas* the validity of the challenged regulation was conceded by the property owner and assumed by the Court. 120 L. Ed. 2d at 808. There was never any question that the regulation substantially advanced legitimate state interests and thus met the standards of *Agins*' first prong. Still, this Court held that, absent some

preexisting limitation in the land's title, the property owner was due compensation for a taking under *Agins'* second prong solely on account of the economic impact of the regulation.[3] *Lucas*, 120 L. Ed. 2d at 815-16 and 820. As it did in *Nollan*, the Supreme Court in *Lucas* found a compensable taking where only one prong of the *Agins* test was violated.[4] ***In doing so it rejected the holding of the South Carolina Supreme Court that both prongs of Agins had to be satisfied for a compensable taking--the very position the court below has taken.*** *See Lucas v. South Carolina Coastal Council*, 304 S.E.2d 895, 901-02 (S.C. 1991) (no taking arises when government advances a legitimate police power interest even if all economically viable use is denied), *rev'd*, 120 L. Ed. 798 (1992).

Finally, the Supreme Court in *Dolan v. City of Tigard*--the final case the Court of Appeal cites for the false notion that economic impact is always intertwined with the takings inquiry--made it clear that its takings analysis rested solely

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[3] The Supreme Court indicated that no compensation would be due for denial of all economically viable use if the state were merely preventing a traditional common law nuisance or enforcing a preexisting limitation in the property's title. *Lucas*, 120 L. Ed. 2d at 820-21.

[4] It is also worth noting that in *Lucas* the Court again stated the *Agins* test in the positive voice originally used in *Agins:* "[T]he Fifth Amendment is violated when land use regulation 'does not substantially advance legitimate state interests *or denies an owner economically viable use of his land.*' [Citation to *Agins*.]" *Lucas*, 120 L. Ed. 2d at 813 (emphasis in original). The Court of Appeal's implication that the Supreme Court has somehow backed off the "either/or" standard originally elaborated in *Agins*, *Del Oro Hills*, 31 Cal. App. 4th at 1079, has no merit.

on the first prong of the *Agins* test. The Court explicitly stated that the economic impact of the challenged regulation had nothing to do with the Court's decision to invalidate a regulation as an unconstitutional taking. 129 L. Ed. 2d at 316 n.6 ("There can be no argument that the permit conditions would deprive petitioner of 'economically beneficial us[e]' of her property as she currently operates a retail store on the lot."). As in *Nollan*, the challenged regulation failed to substantially advance a legitimate government interest as required by the first prong of the *Agins* test.

If a regulation effects a taking under *Agins* because it fails to substantially advance a legitimate governmental interest, then the responsible governmental agency may rescind the offending regulation, or it may decide to simply condemn property adversely affected. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. at 321. In either event, compensation is due at least for the period of time in which the regulation was in effect. *Id.*

In sum, the Court of Appeal's holding that both prongs of the *Agins* test must be satisfied before a taking may be found directly conflicts with one of the most deeply rooted doctrines in takings law. No precedent exists to support this conclusion and the Court of Appeal lacks authority to contradict the United States Supreme Court on the interpretation of federally guaranteed constitutional rights.

II

CONFUSION PREVAILS AMONG STATE COURTS AND FEDERAL CIRCUIT COURTS REGARDING THE CORRECT APPLICATION OF THE TWO-PRONG AGINS TEST

Although this Court's precedent supports the disjunctive interpretation of the *Agins* test, lower state and federal courts lack uniformity in their application of *Agins* to regulatory takings. The following analysis demonstrates that among state and federal courts, at least six different applications of the *Agins* test exist. It is not that all these formulations are wrong; some are quite cogent and practical; others considerably less so. The problem is that in trying to determine whether a regulation constitutes a taking, property owners and government regulators are buried in a morass of contradictory doctrinal confusion. Thus, further guidance from this Court regarding the proper application of the *Agins* test would facilitate much needed consistency and predictability in regulatory takings doctrine.

A. Some Courts Properly Apply the Disjunctive Test

The disjunctive application recognizes both prongs of the *Agins* test. Furthermore, it presumes that satisfaction of either prong suffices to constitute a regulatory taking. *Seawall Association v. City of New York*, 542 N.E.2d 1059 (N.Y. 1989), exemplifies the line of cases supporting the disjunctive application of the *Agins* test.[5]

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[5] *See also McDougal v. County of Imperial*, 942 F.2d at 677 (reciting disjunctive *Agins* test in negative voice); *Kelly v. Tahoe Regional Planning Agency*, 855 P.2d 1027, 1033 (Nev. 1993) (reciting disjunctive *Agins* test); *Miller v. Columbia River Gorge Commission*, 848 P.2d 629, 630 and 630 n.1 (Or. Ct. App. 1993) (acknowledging that taking

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In *Seawall*, real estate developers challenged a local law that prohibited conversion or demolition of single-room occupancy properties. *Id.* at 1060. The law also required owners to restore such properties and indefinitely lease them at controlled rents. *Id.* at 1061. The developers claimed that the local law was invalid and violated the Federal and State Constitutions as a regulatory taking. *Id.* The New York Court of Appeals reasoned that the challenged law did not substantially advance legitimate state interests because the defendants did not show the required nexus between the law and its purpose--the reduction of homelessness. *Id.* at 1069. Moreover, the Court of Appeals determined that the local law's requirement that owners indefinitely lease their properties at controlled rents denied property owners economically viable use of their property. *Id.* at 1068. Reversing the decision of the New York Supreme Court, *id.* at 1062, the Court of Appeals held that under either prong of the *Agins* test, the regulation was invalid and constituted a regulatory taking. *Id.* at 1068-69.

Other cases have found a regulatory taking under the first prong of the *Agins* test without proceeding to analyze the second prong.[6] *Manocherian v. Lenox Hill Hospital,*

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[5] (...continued)
occurs if either prong of *Agins* test is satisfied); *Gardner v. New Jersey Pinelands Commission*, 593 A.2d 251, 257 (N.J. 1991) (reciting disjunctive *Agins* test in negative voice).

[6] *See, e.g., Schultz v. City of Grants Pass,* 884 P.2d at 573 (holding that imposed exaction of land was regulatory taking because exaction did not relate to impact of plaintiffs' proposed development); *Whitehead Oil Co. v. City of Lincoln,* 515 N.W. 2d 401 (holding that arbitrary and capricious government action did not advance legitimate state interest and thus was regulatory taking).

643 N.E.2d 479 (N.Y. 1994), represents this line of disjunctive application cases. In *Manocherian*, apartment owners challenged a city ordinance requiring them to offer renewal leases on apartments to a nonprofit hospital. *Id.* at 480. The New York Court of Appeals opined that the challenged ordinance did not substantially advance the ordinance's stated purpose to lessen the emergency housing shortage. *Id.* at 485. Rather, it subsidized the hospital. *Id.* at 484. Accordingly, the Court of Appeals reversed the decision of the New York Supreme Court and held that the challenged ordinance constituted a regulatory taking. *Id.* at 486. The Court of Appeals concluded that in light of the ordinance's failure to pass the first prong of the *Agins* test, analysis of the second prong was unnecessary. *Id.* at 486-87.

B. Some Courts Confuse Agins and Embrace a Conjunctive Test

Despite seemingly clear contrary authority, a minority of lower courts maintain that the *Agins* test is conjunctive. Similar to the disjunctive application, the conjunctive application recognizes both prongs of the *Agins* test. It does not, however, acknowledge a regulatory taking unless the plaintiff has satisfied ***both*** prongs. Thus, under the conjunctive application, one who alleges a regulatory taking must prove both that the regulation fails to substantially advance a legitimate state interest and that the regulation denies the owner economically viable use of her property.

Other than the California Court of Appeal's decision in *Del Oro Hills v. City of Oceanside*, 31 Cal. App. 4th at 1060, only one other lower court decision supports the conjunctive application of the *Agins* test. *See Gerijo, Inc. v. City of Fairfield*, 638 N.E.2d 533 (Ohio 1994), *cert. denied*, __ U.S. __, 130 L. Ed. 2d 1068 (1995) (applying conjunctive *Agins* test). In *Gerijo*, the Ohio Supreme Court reversed the appellate court's finding that a zoning ordinance which fails to substantially advance a legitimate state interest is

invalid as a regulatory taking. Relying on lower state court decisions, the Ohio Supreme Court held that to prove a regulatory taking, the plaintiff must prove both that the regulation fails to substantially advance a legitimate state interest and that it denies the owner economically viable use of her property. *Id.* at 230-31. The court in *Gerijo* did not acknowledge this Court's decision in *Agins*. *Id.* at 231 (Pfeifer, J., dissenting).

C. A Few Courts Have Adopted What Can Best be Described as an Exclusive Substantive Due Process/Effective Conjunctive Test

The exclusive substantive due process application either explicitly or implicitly analyzes the first prong of the *Agins* test as a substantive due process claim. As with the conjunctive application, however, it consistently requires satisfaction of the second prong in order to find a regulatory taking that merits just compensation. For this reason it shall be referred to as the effective conjunctive application.

The Eleventh Circuit Court of Appeals employed the effective conjunctive application in *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991). There, the plaintiff advanced a substantive due process claim on the basis that a county zoning ordinance was unconstitutional as applied to his property. *Id.* at 718. Plaintiff sought both declaratory relief and compensatory damages. *Id.* The Court of Appeals in *Eide* analyzed both prongs of the *Agins* test as separate claims. *Id.* at 721. Neither mentioning nor analyzing this Court's decision in *Agins*, the Court of Appeals stated in *dicta* that "arbitrary and capricious due process" is the theory under which to challenge a regulation that is arbitrary and capricious, not takings doctrine. *Id.* at 722. Thus, the Court of Appeals effectively determined that a claim brought under the first prong of *Agins*, the legitimate state interest requirement, is a due process claim, not a takings claim. While the court

averred that damages might be available, where this formulation leaves the heightened scrutiny takings standard of *Nollan* is in doubt. *See Nollan*, 483 U.S. at 834 n.3.

In contrast, to bring a "due process takings claim" the Court of Appeals stated that the plaintiff must establish that the challenged regulation destroyed the value of her property, effectively taking the property by eminent domain. *Id.* at 722. The "due process takings claim" resembles the second prong of the *Agins* test which requires that the challenged regulation deny the owner economically viable use of her property.

Hence, under *Eide*, merely satisfying the first prong of the *Agins* test apparently never amounts to a regulatory taking. Accordingly, to establish a regulatory taking the effective conjunctive application always requires plaintiffs to satisfy the second prong of the *Agins* test.[7]

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[7] *See also Christopher Lake Development Co. v. St. Louis County*, 35 F.3d 1269, 1274-75 (8th Cir. 1994) (stating that arbitrary and capricious government action constitutes "arbitrary and capricious due process" claim and that "due process takings claim" requires showing that regulation destroys owner's property value); *Bello v. Walker*, 840 F.2d 1124, 1128-31 (3d Cir. 1988), *cert. denied*, 488 U.S. 868 (1988) (analyzing arbitrary and capricious government action as substantive due process claim, holding that takings claim requires showing that owners have lost all use of property); *City of Pompano Beach v. Yardarm Restaurant, Inc.*, 641 So. 2d 1377, 1384 (Fla. Dist. Ct. App. 1994), *cert. denied*, _ U.S. _, 63 U.S.L.W. 3890 (1995) (rejecting plaintiff's inverse condemnation claim on ground that satisfaction of first prong of *Agins* was insufficient, stating that "[the lower court's decision in plaintiff's favor] was an understandable

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Because *Eide* discussed these issues primarily in dicta, and did not apply each formulation to the allegations in the case, it is difficult to be certain exactly how inconsistent the formulations are with the precedent of this Court regarding standards of review and burdens of proof as outlined in *Nollan* and *Dolan*. In any event, the rather ambiguous tautology of the Eleventh Circuit points out the doctrinal conflict inherent in cases like *Del Oro Hills*.

D. Application of a Nonexclusive Substantive Due Process Standard Allows the Use of Both a Substantive Due Process and a Takings Analysis

The nonexclusive substantive due process application permits first prong *Agins* claims under either the "arbitrary and capricious due process" theory or the Fifth Amendment takings theory. This application highlights the difference in standards of review between a due process claim and a takings claim. Furthermore, it demonstrates how applying an exclusive due process theory to a takings claim permits lower courts to elude *Nollan*'s heightened standard of review for takings claims. Avoidance of the "essential nexus" test set out in *Nollan*, 483 U.S. at 837, places the burden of proof for takings claims on property owners. According to this Court's decision in *Dolan v. City of Tigard,* 129 L. Ed. 2d 304, however, the burden of proof for such claims properly lies with the government. *Id.* at 323.

Chief Judge Oakes applied the nonexclusive substantive due process analysis in his opinion for the Second Circuit Court of Appeals in *Southview Association, Ltd. v. Bongartz,* 980 F.2d 84 (2d Cir. 1992), *cert. denied,* __ U.S. __,

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[7] (...continued)
error given that 'takings' law is one of the most confused areas in American jurisprudence").

123 L. Ed. 2d 153 (1993). *See also Halverson v. Skagit County*, 42 F.3d 1257, 1261 (9th Cir. 1995) (stating that facts which form basis of "arbitrary and capricious due process" claim may also form basis of takings claim). In *Southview*, a developer advanced substantive due process and takings claims against members of the Vermont Environmental Board. *Id.* at 101 and 107. The complaint alleged that the Vermont Environmental Board's denial of a permit was arbitrary and capricious and failed to substantially advance a legitimate state interest. *Id.*

The Second Circuit affirmed the lower court's dismissal on ripeness grounds. *Id.* at 100. However, Judge Oakes proceeded to analyze the merits of the case.[8] *Id.* at 101-09. Judge Oakes first analyzed plaintiff's substantive due process claim. Rejecting the validity of this claim, Judge Oakes reasoned that government regulation of a landowner's property violates the landowner's right to substantive due process "only when government acts with 'no legitimate reason for its decision.'" *Id.* at 102. Thus, to avoid liability for a substantive due process violation, government need only advance a legitimate reason for its decision. Under a substantive due process theory, plaintiff carries the greater burden of proving that the government's decision was completely irrational. *Id.* at 104.

Next, Judge Oakes analyzed plaintiff's takings claim. Also rejecting the validity of the takings claim, Judge Oakes determined that government regulation effects a taking of property without just compensation when a regulation fails to "substantially advance" a legitimate state interest. *Id.* at 107. Accordingly, to avoid liability for a taking, the government must establish that a nexus exists between the challenged

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[8] Judge Oakes's analysis of the merits did not necessarily represent the official view of the Second Circuit panel. *Southview*, 980 F.2d at 100.

regulation and the state's interest. *Id.* at 108. Under a takings theory, the government carries the greater burden of proving that its decision substantially advanced a legitimate state interest. This result is, of course, contrary to the formulation in *Del Oro Hills.*

Under a nonexclusive due process theory, substantive due process merely supplements takings as a theory of recovery. Under an exclusive due process theory, however, substantive due process is the only means by which plaintiff can recover under the "legitimate state interest" prong of *Agins.* Because substantive due process theory places the burden on the plaintiff to prove that the challenged government regulation lacks any rational basis, the exclusive due process application eludes the "essential nexus" requirements of both *Nollan* and *Dolan.*

E. A "Balancing" Test Applied by Some Courts Subsumes or Ignores the Two-Prong Agins Test

The balancing application effectively analyzes the second prong of the *Agins* test under the three-part balancing test set out in *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 124 (1978). Courts applying the balancing test either ignore the first prong of *Agins*, or they conclude that plaintiff has failed to satisfy the first prong. To determine whether a regulation has denied the owner economically viable use of her property, courts employing the balancing application analyze: (1) the economic impact of the regulation on the plaintiff; (2) the extent to which the regulation interferes with the plaintiff's investment-backed expectations; and (3) the character of the government action. *Id.* Most prominent among cases applying the *Penn Central* analysis is the First Circuit's decision in *McAndrews v. Fleet Bank of Massachusetts*, 989 F.2d 13 (1st Cir. 1993). *See also Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 170-71 (4th Cir. 1991), *cert. denied*, ___ U.S. ___, 120 L. Ed. 2d 898 (1992) (applying *Penn Central* balancing

test to analyze second prong of *Agins* test after determining that plaintiff has failed to satisfy first prong); *Woodbury Place Partners v. City of Woodbury*, 492 N.W.2d 258, 262 (Minn. Ct. App. 1993), *cert. denied*, ___ U.S. __, 124 L. Ed. 2d 679 (1993) (remanding to District Court to determine existence of regulatory taking under "economically viable use" analysis in light of *Penn Central* balancing test). *But see Loveladies Harbor v. United States*, 28 F.3d 1171, 1179 (Fed. Cir. 1994) (supplementing and partially rejecting *Penn Central* balancing test in favor of *Lucas v. South Carolina Coastal Commission* analysis).

In *McAndrews*, a property owner challenged federal legislation which prohibited him from canceling a lease upon the lessee bank's insolvency. *McAndrews*, 989 F.2d at 14. In determining whether the property owner had suffered a regulatory taking under the second prong of *Agins*, the First Circuit separately analyzed each factor of the *Penn Central* balancing test. *Id.* at 18-20. The First Circuit ignored the first prong of the *Agins* test. The court's avoidance of consideration of the first prong of *Agins* arguably led to a result less favorable to the property owner than justified.

F. Other Courts Use Second Prong Takings Analysis Exclusively, Calling the First Prong Irrelevant

Finally, the second prong application limits analysis to the second prong of the *Agins* test, while it consistently ignores analysis of the first prong. Among cases subscribing to the second prong application, *Reahard v. Lee County*, 968 F.2d 1131 (11th Cir. 1992), provides a unique analysis. *See also Moore v. City of Costa Mesa*, 886 F.2d 260, 263 (1989), *cert. denied*, 496 U.S. 906 (1990) (restricting takings analysis to second prong of *Agins* test despite lower court's finding that challenged regulation was invalid but not unconstitutional); *City of Pompano Beach v. Yardarm Restaurant*, 641 So. 2d at 1384. The Eleventh Circuit stated in *Reahard* that just compensation claims always rely on a

second prong *Agins* analysis, and that *Agins*' first prong is irrelevant to such claims. *Reahard,* 968 F.2d at 1136.

In *Reahard*, landowners challenged a county land use plan which limited development on their land. *Id.* at 1133. The landowners conceded that the plan was a valid exercise of police power. *Id.* at 1135. However, they claimed that the county owed them just compensation because it had interfered with the landowners' reasonable investment-backed expectations. *Id.* The Court of Appeals reasoned in *dicta* that just compensation claims assume that the challenged regulation substantially advances a legitimate state interest. *Id.* at 1136. Thus, the only relevant inquiry is the extent to which the regulation deprived plaintiffs of economically viable use of their property. *Id.* The Court of Appeals accordingly vacated the judgment of the District Court and remanded the case for further analysis consistent with its opinion. *Id.* at 1136.

The Court of Appeals' *dicta* regarding just compensation claims conflicts with this Court's decision in *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987). In *First English*, this Court held that invalidation of a regulation is constitutionally insufficient without monetary payment to compensate for loss of the property's use during the time in which the regulation was in effect. *Id.* at 321. Contrary to the reasoning of the Eleventh Circuit in *Reahard*, under *First English* a just compensation claim is available when a regulation takes property because it fails to substantially advance a legitimate governmental interest. Thus while a takings case may assume the validity of the challenged regulation as in *Lucas*, that should not be a necessary predicate.

CONCLUSION

Despite having suffered substantial damages as a result of an unlawful ordinance, Del Oro Hills was denied the right to establish a claim for an inverse condemnation taking. Del Oro Hills should be given an opportunity to prove there was a taking because the offending regulation failed to substantially advance a legitimate governmental interest. In proving a taking, of course, Del Oro Hills may rely on the heightened level of judicial scrutiny of regulations not otherwise available in mere due process claims. Additionally, Del Oro Hills should have right to recover whatever takings damages it can prove it suffered during the period of time in which the offending regulation was in place.

The two-prong *Agins* test is a central pillar of takings jurisprudence. Topple it, and much of the edifice of takings law comes tumbling down; and with such a collapse the fundamental individual right to own and reasonably use property free from arbitrary and inequitable regulations will be severely abridged. If such a dramatic reduction in the constitutional protections for property rights is to occur, it will have to come from the United States Supreme Court and not the California Court of Appeal.

For the foregoing reasons amicus Pacific Legal Foundation respectfully urges this Court to grant certiorari.

DATED: July, 1995.

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No. 94-2112

In The

Supreme Court of the United States

October Term, 1995

DEL ORO HILLS,

Petitioner,

v.

CITY OF OCEANSIDE,

Respondent.

Petition For Writ Of Certiorari To The California Court Of Appeal, Fourth Appellate District, Division One

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

REPLY TO CITY'S STATEMENT OF FACTS 1

REPLY TO CITY'S ARGUMENT..... 2

I. DEL ORO PURSUED ALL APPROPRIATE STATE JUDICIAL REMEDIES FOR ITS TAKING ACTION 2

A. DEL ORO Availed Itself of State Procedures for Bringing a Taking Claim..... 3

B. Pursuit of Just Compensation is a Federal Law Claim, and DEL ORO Pursued Its Federal Law Claim in State Court..... 3

C. A Federal Regulatory Taking Claim is the Same as a California Inverse Condemnation Claim 5

D. The State Judicial Action Requirement Affects the Jurisdiction of Taking Cases Brought for the First Time in Federal Trial Courts 6

E. The Pursuit of State Judicial Remedies, Even if Required, Should be Required only of "As-Applied" Challenges..... 6

F. A State Inverse Condemnation Claim Would Have Been Futile 7

II. PROP. A DID NOT SUBSTANTIALLY ADVANCE LEGITIMATE STATE INTERESTS 9

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Agins v. City of Tiburon, 447 U.S. 255 (1980)..... 7

Bates v. Little Rock, 361 U.S. 516 (1960)..... 9

Building Industry Association of San Diego, Inc. v. City of Oceanside, 27 Cal.App.4th 744 (1994), rev. den. October 13, 1994 1

Crow-New Jersey, 32 Ltd. v. Township of Clinton, 718 F.Supp. 378 (D. N.J. 1989) 6

Dodd v. Hood River County, ___ F.2d ___ (9th Cir. 1995) [95 Daily Journal D.A.R. 8730]..... 4

Estate of Himelstein v. City of Fort Wayne, 898 F.2d 573 (7th Cir. 1990)..... 3

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) 4, 5, 7, 8

Gilbert v. City of Cambridge, 932 F.2d 51 (1st Cir. 1991)..... 3

Hodel v. Virginia Surface Mining & Reclamation Association, Inc., 452 U.S. 264 (1981)..... 7

Jama Construction v. City of Los Angeles, 938 F.2d 1045 (9th Cir. 1991)..... 8

Keystone Bituminous Coal Association v. DeBenedictus, 480 U.S. 470 (1987)..... 7

Long Beach Equities v. County of Ventura, 231 Cal.App.3d 1016 (1991) 4

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 7

TABLE OF AUTHORITIES – Continued

Page

Southern Pacific Transportation Co. v. City of Los Angeles, 922 F.2d 498 (9th Cir. 1990).....6, 7

Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985).....3, 4, 5, 6

STATUTES

42 United States Code

Section 1983..... *passim*

UNITED STATES CONSTITUTION

Fifth Amendment.....4, 5

No. 94-2112

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DEL ORO HILLS,

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

REPLY TO CITY'S STATEMENT OF FACTS

Regrettably, DEL ORO HILLS ("DEL ORO") must point out that it is CITY OF OCEANSIDE'S ("CITY") Statement of the Facts which is misleading.

First, the California Court of Appeal in *Building Industry Association of San Diego, Inc. v. City of Oceanside,* 27 Cal.App.4th 744 (1994) [Petition, Appendix B] did not address the trial court's ruling that Proposition A ("Prop. A") reasonably related to the public welfare, because to do so was unnecessary in light of Prop. A's invalidity for other reasons. Nonetheless, the Court of Appeal *reversed*

the entire judgment of the trial court. Thus, the trial court "ruling" to which CITY refers has not survived as the law of this case.

Second, the record will show that DEL ORO's principal (Robinhood Homes, Inc.) lost money on the villages it purchased from DEL ORO. Robinhood "profited" only as a haberdasher "profits" when he buys a tie for one dollar at wholesale and sells it for two dollars retail. There is no real profit, however, unless he has money left over after paying salaries, rent, the light and telephone bills, etc. The development of land is a business with a business's normal expenses, and it requires management with management costs. When those costs and expenses are taken into account, the evidence submitted to the trial court showed net losses to DEL ORO's principal from the Del Oro project.

REPLY TO CITY'S ARGUMENT

I

DEL ORO PURSUED ALL APPROPRIATE STATE JUDICIAL REMEDIES FOR ITS TAKING ACTION

CITY contends that this Court lacks jurisdiction because DEL ORO did not pursue a cause of action for "inverse condemnation" in the state court. This contention is invalid for several reasons.

A. DEL ORO Availed Itself of State Procedures for Bringing a Taking Claim.

DEL ORO first brought its taking claim in the state's trial court through a cause of action invoking 42 United States Code section 1983, and it pursued the taking claim through all appellate courts of the state before petitioning this Court. The trial court denied the claim on the basis that no taking had occurred. It never reached the issue of just compensation. DEL ORO was not required to do any more than to avail itself of available state *procedures* to obtain just compensation. So long as the state trial court had the first opportunity to rule upon the taking claim, the requirement of *Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172 (1985) ("*Williamson*") is satisfied.

Most cases cited by CITY emphasize that to have a ripe taking claim, a plaintiff must avail itself of state *procedures* before bringing a claim in federal court. (See, e.g., *Gilbert v. City of Cambridge,* 932 F.2d 51, 63 (1st Cir. 1991).) As most succinctly stated in *Estate of Himelstein v. City of Fort Wayne,* 898 F.2d 573, 576 (7th Cir. 1990), "a federal taking claim is not ripe until it is apparent the state does not intend to pay compensation." It is now quite apparent the State of California does not intend to allow DEL ORO compensation.

B. Pursuit of Just Compensation is a Federal Law Claim, and DEL ORO Pursued Its Federal Law Claim in State Court.

"Just compensation" is a constitutionally-mandated remedy, so the state "inverse condemnation" cause of

action is basically a federal law claim. As this court stated in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987) ("*First English*"):

> " . . . a landowner is entitled to bring an action in inverse condemnation as a result of the self-executing character of the constitutional provision with respect to just compensation."

A taking claim is decided with reference to federal decisions on the Fifth Amendment. Certainly, in California that is so. In *Long Beach Equities v. County of Ventura*, 231 Cal.App.3d 1016 (1991), the California Court of Appeal defines a taking in a manner identical to that of this Court:

> "To state a cause of action for inverse condemnation, LBE must plead facts which show either that: (1) the application of the general zoning laws to its property does not substantially advance a legitimate state interest; or (2) such laws deprive it of substantially all economically viable use of its land. [Citing *Agins*] . . . "

Indeed, there is no indication that the California substantive law on regulatory takings is any different than the federal law. Therefore, by bringing its section 1983 claim in the state trial court in the first instance, DEL ORO asked the state courts for a ruling on the taking issue and has satisfied the *Williamson* state judicial remedy ripeness requirement.[1]

---

[1] While the Ninth Circuit Court of Appeal has ruled that it is not *mandatory* that a section 1983 action be brought in state court in the first instance (*Dodd v. Hood River County*, ___ F.2d

C. A Federal Regulatory Taking Claim is the Same as a California Inverse Condemnation Claim.

Under California law, whether a taking has occurred under California "inverse condemnation law" is synonymous with whether a regulatory taking has occurred under the Fifth Amendment. The California courts already decided, in the context of DEL ORO's section 1983 action, that under the Fifth Amendment no regulatory taking had occurred in this case. In California, if the substantive law were more stringent than federal law in its definition of taking, it would be unconstitutional. If California and federal law were the same, and to all appearances they are, then a state inverse condemnation law claim would be redundant to a taking claim brought under section 1983.[2]

___ (9th Cir. 1995) [95 Daily Journal D.A.R. 8730]), Senior Circuit Judge Tang, in his dissent, stated that the "state procedure" which *Williamson* mandates is, indeed, a *federal* taking claim through a section 1983 action brought in the state court, under its concurrent jurisdiction over section 1983 suits.

[2] There is no possibility that California's definition of a regulatory taking is less stringent than federal law. No California case even suggests such a view, and the California courts' previous nonconformance with other states on the availability of inverse condemnation damages for regulatory takings, which nonconformance triggered the *First English* decision, evidences the state's reluctance to find, and compensate for, regulatory takings.

D. The State Judicial Action Requirement Affects the Jurisdiction of Taking Cases Brought for the First Time in Federal Trial Courts.

The federal cases cited by CITY all deal with taking claims brought, if at all, in a federal district court in the first instance. No case cited by CITY, or known to DEL ORO, states that commencing a section 1983 action in *state* court, and obtaining a ruling that no taking has occurred, are not sufficient to support federal *appellate* jurisdiction over the taking issue.

E. The Pursuit of State Judicial Remedies, Even if Required, Should be Required Only of "As-Applied" Challenges.

DEL ORO had no realistic opportunity to seek approvals of development of its land, because of the condition of financial extremis created by the imposition of the invalid Prop. A, and, therefore, it should have been relieved of the conventional ripeness requirement of an application for use before bringing its as-applied challenge. However, the thrust of DEL ORO's Petition is that its *facial* taking claim was wrongly decided by the California courts.

This Court in *Williamson* did not address the issue whether the state judicial action ripeness hurdle, which stands in the way of as-applied challenges, also obstructs their facial counterparts. (*Southern Pacific Transportation Co. v. City of Los Angeles*, 922 F.2d 498, 505 (9th Cir. 1990) (*"Southern Pacific"*).) Some courts have found it does not. (See, e.g., *Crow-New Jersey, 32 Ltd. v. Township of Clinton*, 718 F.Supp. 378, 382-83 (D. N.J. 1989).) This Court often

has reached the merits of facial attacks without regard for ripeness consideration. (*Agins v. City of Tiburon*, 447 U.S. 255 (1980) ("*Agins*"); *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U.S. 264 (1981) ("*Hodel*"); *Keystone Bituminous Coal Association v. DeBenedictus*, 480 U.S. 470 (1987) ("*Keystone*"); *Loretto v. Teleprompter Manhattan CATV Corp.*, 438 U.S. 419 (1982) ("*Loretto*").)

While the Ninth Circuit in *Southern Pacific* decided that the same state court action ripeness considerations apply to facial challenges, it distinguished *Agins, Hodel, Loretto* and *Keystone* by noting that "all had to do exclusively with the question whether the regulation amounted to a taking." (922 F.2d at 506).[3] That is precisely the posture of DEL ORO's Petition: it deals exclusively with whether a regulatory taking has occurred. If it has, then DEL ORO expects this Court will return the case to the California courts for a determination of just compensation.

F. A State Inverse Condemnation Claim Would Have Been Futile.

It should be noted that DEL ORO filed its original complaint with the San Diego Superior Court on June 3, 1987, six days *before* the decision in *First English* on June

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[3] In a note, the Ninth Circuit Court of Appeal stated:

"This is not to say that all facial challenges to zoning restrictions will be subject to this hurdle. In some instances, as we have seen, it will not be an issue because the court is simply considering whether a taking has occurred, not whether it is a taking 'without just compensation.' . . . " (922 F.2d at 506, n. 11.)

9, 1987. At the time of the filing, California law did not provide a damages ready for a regulatory taking. Thus, a cause of action for inverse condemnation under state substantive law would have been futile.[4]

After *First English* was decided, DEL ORO amended its complaint.

Through the Seventeenth Cause of Action, DEL ORO directly addressed the impact of adoption of Prop. A and CITY's refusal, after DEL ORO's request, to exempt DEL ORO from Prop. A on the marketability of DEL ORO's land. The trial court dismissed this latter cause of action and granted summary judgment to the CITY after it decided a taking had not occurred. Thus, as more fully discussed above, the trial court decided the very same issue which it would have been called on to decide if DEL

---

[4]"If the alleged 'taking' of Jama's property occurred before the Supreme Court decided *First English* [etc.], Jama's failure to seek compensation through state procedures might be forgiven as 'futile.' . . . Before *First English*, California law precluded a landowner from recovering damages on an inverse condemnation action for a temporary regulatory taking. [Citing *Agins*]." (*Jama Construction v. City of Los Angeles*, 938 F.2d 1045, 1048 (9th Cir. 1991).)

While DEL ORO included a Fifth Cause of Action for inverse condemnation, it was based on allegations that if Prop. A allowed *no* use of DEL ORO's property, DEL ORO's investment in an installation of public infrastructure would have been a "taking" and would have unjustly enriched the CITY. Because Prop. A ultimately allowed the use of DEL ORO's property, the cause of action related to the public improvements became moot, and so DEL ORO abandoned it.

ORO had brought an inverse condemnation cause of action under California substantive law in the first place.

II

PROP. A DID NOT SUBSTANTIALLY ADVANCE LEGITIMATE STATE INTERESTS

With reference to CITY's arguments on the merits, DEL ORO will largely stand on its Petition. However, to the extent CITY relies so heavily on the purposes set forth in Prop. A itself (CITY's Opposition, pp. 11-16), DEL ORO offers the following observation from this Court's decision in *Bates v. Little Rock*, 361 U.S. 516, 525 (1960):

> "But governmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion in the preamble of an ordinance."

CONCLUSION

The Petition continues to present issues necessary and appropriate for this Court's review, and the Petition should be granted.

Respectfully submitted,

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PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION ONE

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court has jurisdiction over a Fifth Amendment taking claim where the petitioner did not exhaust its state law inverse condemnation remedy.

2. Whether this Court has jurisdiction over any "as applied" taking claim where the petitioner did not apply to develop under the provisions of the ordinance.

3. Whether an ordinance that conflicts with state statutory law is, *per se*, a taking entitling a landowner to compensation for lost profits even though the ordinance did not affect petitioner's use of the land or the timing of development and even though the trial court held that the respondent proved, as a matter of fact, that the ordinance is necessary for the local health, safety or welfare.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES CITED iv

STATEMENT OF JURISDICTION 1

STATEMENT OF THE FACTS AND THE CASE . 2

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I.

THIS COURT LACKS JURISDICTION BECAUSE DEL ORO DID NOT EXHAUST ITS STATE JUDICIAL REMEDIES 5

II.

AN "AS APPLIED" TAKINGS CLAIM IS NOT RIPE BECAUSE DEL ORO DID NOT APPLY TO DEVELOP UNDER THE PROVISIONS OF THE ORDINANCE 7

III.

THE CALIFORNIA COURTS CORRECTLY HELD THAT THE ORDINANCE, ON ITS FACE, SATISFIES BOTH PRONGS OF THE *AGINS* TEST 9

A. Conflicts With State Statutory Law Do Not Establish That The Ordinance, On Its Face, Fails To Sub-

stantially Advance Any Legitimate Governmental Interest. 9

B. The Ordinance Substantially Advances Legitimate Governmental Interests. 11

C. Compensation Is Not Required Where The Property Is Not Deprived Of Substantially All Reasonable Use And Retained Substantial Value. 16

CONCLUSION 20

APPENDIX 1 — Proposition A 1-1

TABLE OF AUTHORITIES CITED

Cases **Page(s)**

Agins v. Tiburon,
447 U.S. 255 (1980) 4, 14
Andrus v. Allard,
444 U.S. 51 (1979) 3, 18
Austin v. City and County of Honolulu,
840 F.2d 678 (9th Cir. 1988) 6
Azul Pacifico, Inc. v. City of Los Angeles,
873 F.2d 704 (9th Cir. 1992) 5
Bello v. Walker,
840 F.2d 1124 (3d Cir. 1988) 10
Building Industry Association of San Diego v.
City of Oceanside,
27 Cal.App.4th 744, 33 Cal.Rptr.2d
137 (1994) 2
Chesterfield Development Corp. v. City of Chesterfield,
963 F.2d 1102 (8th Cir. 1992) 11
Chiplin Enterprises, Inc. v. City of Lebanon,
712 F.2d 1524 (1st Cir. 1983) 11
Coniston Corp. v. Village of Hoffman Estates,
844 F.2d 461 (7th Cir. 1988) 11
Construction Industry Assn. v. City of Petaluma,
522 F.2d 897 *cert. denied* 4, 11, 14
Contra Costa Water District v. Bar-C Prop.,
5 Cal.App.4th 655, 7 Cal.Rptr.2d 91 (1992) 19
Danforth v. United States,
308 U.S. 271 (1939) 18

DeVita v. Napa County,
9 Cal.4th 763, 38 Cal.Rptr.2d
699 (1995) 4, 15
Dolan v. City of Tigard,
___ U.S. ___, 114 S.Ct. 2309 16
Estate of Himelstein v. City of Fort Wayne,
898 F.2d 573 (7th Cir. 1990) 5-6
First English Evangelical Church of Glendale v. County
of Los Angeles,
482 U.S. 304 (1987) 3, 6, 16, 17, 18
Gamble v. Eau Claire County,
5 F.3d 285, (7th Cir. 1993) 5
G.M. Engineers & Associates, Inc. v. West
Bloomfield Township,
922 F.2d 328 (6th Cir. 1990) 6
Gilbert v. City of Cambridge,
932 F.2d 51 (1st Cir. 1991) 5
Greenbriar, Ltd. v. City of Alabaster,
881 F.2d 1570 (11th Cir. 1989) 5
Harding v. County of Door,
870 F.2d 430 (7th Cir. 1989), *cert. denied*,
110 S.Ct. 154 11
Halverson v. Skagit County,
42 F.3d 1257 (9th Cir. 1994) 20
Healing v. California Coastal Commission,
22 Cal.App.4th 1158, 27 Cal.Rptr.2d
758 (1994) 6
Hensler v. City of Glendale,
8 Cal.4th 1, 32 Cal.Rptr.2d 244 (1994) 6
Hodel v. Irving,
481 U.S. 704 (1987) 16, 19

Kawaoka v. City of Arroyo Grande,
17 F.3d 1227 (9th Cir. 1994) 14
Kirby Forest Industries v. United States,
467 U.S. 1 (1984) 16
Long Beach Equities v. County of Ventura
(City of Simi Valley),
231 Cal.App.3d 1016, 282 Cal.Rptr. 877
(1991) *cert. den.* (1992) 14
Lucas v. South Carolina Coastal Council,
505 U.S. ___, 112 S.Ct. 2886
(1992) 3, 4, 16
MacLeod v. Santa Clara County,
749 F.2d at p. 548 18
Memphis Community School Dist. v. Stachura,
477 U.S. 299 (1986) 10
Moore v. City of Costa Mesa,
886 F.2d 260 (9th Cir. 1989) 4, 10
Nollan v. California Coastal Commission,
483 U.S. 825 (1987) 16
Penn Central Transportation Co. v. New York City,
438 U.S. 104 (1978) 19
Preseault v. ICC,
494 U.S. 1, 110 S.Ct. 914, (1990) 7
Schnuck v. City of Santa Monica,
935 F.2d 171 (9th Cir. 1991) 6
Sierra Club v. City of Hayward,
28 Cal.3d 840, 171 Cal.Rptr.
619 (1981) 16
Sinaloa Lake Owners Assn. v. Simi Valley,
882 F.2d 1398 (9th Cir. 1989) 6

Southern Pacific Transportation Co. v. City of Los Angeles, 922 F.2d 498 (9th Cir. 1990) 5
Village of Belle Terre v. Boraas, 416 U.S. 1 (1994) 4, 14
Williamson County Regional Planning Comm. v. Hamilton Bank, 473 U.S. 172 (1985) 1, 4, 6, 7

United States Constitution

Fifth Amendment 5, 6

Statutes

42 U.S.C.
Section 1983 5

California Statutes

Evidence Code
Section 669.5 . . . . . 2-3, 13

Other Authorities

Bank of America et al., Beyond Sprawl: New Patterns of Growth to Fit the New California (1995) 15

4 Nichols, Eminent Domain (3d ed. 1992 supp.), § 12B.14 19

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STATEMENT OF JURISDICTION

The Court lacks subject matter jurisdiction over any Fifth Amendment "taking" claim, facial or "as applied", because the petitioner, Del Oro Hills ("Del Oro"), did not exhaust its inverse condemnation remedy under the California Constitution. *Williamson County Regional Planning Comm. v. Hamilton Bank*, 473 U.S. 172, 194-196 (1985). The Court also lacks subject matter jurisdiction over any "as applied" taking claim because Del Oro did not apply for, and was not denied, development approvals under the provisions of the ordinance. *Williamson County*, 473 U.S. 172, 199-200.

STATEMENT OF THE FACTS AND THE CASE

The factual and procedural background of this case is well-summarized in the California Court of Appeal's opinion, Appendix A to the petition, pages A-3 through A-14.

Del Oro's statement of the case is extremely misleading. Some of the relevant facts and procedural matters that the petition fails to mention are listed below.

1. Del Oro never pursued its state inverse condemnation cause of action. A-12, fn. 5.

2. Del Oro never applied for or was denied permission to develop its property. A-23.

3. Del Oro's master subdivision map specifically stated "the approval of the map does not grant any development rights". A-9.

4. The ordinance did not, in fact, interfere with Del Oro's plans for development. Del Oro sold all of its villages and the developers of the villages all received development permits within Del Oro's own time frame. A-10 through A-11.

5. The California Court of Appeal in *Building Industry Association of San Diego v. City of Oceanside* (27 Cal.App.4th 744, 33 Cal.Rptr.2d 137 (1994) (Petition, Appendix B) did not reverse the trial court's ruling that the ordinance substantially advances a proper governmental interest. After a lengthy evidentiary trial, the Court held that the ordinance is justified under California Evidence Code Section 669.5 which reverses the normal

presumption of validity and places a heavy burden of proof on the local government.

6. The record of this case contains substantial evidence that the ordinance, in fact, substantially advances legitimate governmental interests.

7. The record of this case shows that Del Oro's principals actually secured millions of dollars in profits from the sale of the villages.

SUMMARY OF ARGUMENT

Del Oro contends that the Fifth Amendment to the United States Constitution automatically entitles a landowner to damages whenever a local regulation is held to be invalid because it conflicts with state statutory law. The Fifth Amendment is not a remedy for every perceived governmental error. The Constitution does not prohibit takings; it *authorizes* governments to take property upon payment of "just compensation". In the context of a regulatory taking, no compensation is due unless the property is deprived of substantially all reasonable, beneficial or productive use. *First English Evangelical Church of Glendale v. County of Los Angeles,* 482 U.S. 304 (1987); *Lucas v. South Carolina Coastal Council,* 505 U.S. ___, 112 S.Ct. 2886 (1992). "Just compensation" for a regulatory taking does not include compensation for lost profits. *Andrus v. Allard,* 444 U.S. 51 (1979).

Certiorari should not be granted in this case because:

1. Del Oro's Fifth Amendment takings claim is not ripe because Del Oro did not exhaust its state judicial remedies. *Williamson County,* 473 U.S. 172, 194-196.

2. Del Oro cannot state an "as applied" takings claim because Del Oro did not apply or develop under the provisions of the ordinance. *Williamson County*, 473 U.S. 172, 199-200.

3. The California courts correctly found that, in fact, the ordinance satisfies both prongs of the *Agins* test. The evidence in the trial record shows that:

a. The ordinance substantially advances police power purposes which have been held constitutional by state and federal courts. *E.g., Agins v. Tiburon,* 447 U.S. 255 (1980); *Village of Belle Terre v. Boraas,* 416 U.S. 1, 9 (1994); *Construction Industry Assn. v. City of Petaluma,* 522 F.2d 897, 905-908, *cert. denied* (1976) 424 U.S. 934 (9th Cir. 1975); *DeVita v. Napa County,* 9 Cal.4th 763, 38 Cal.Rptr.2d 699 (1995).

b. Del Oro's property was not deprived of substantially all reasonable use. *First English,* 482 U.S. 304, 322; *Lucas,* 112 S.Ct. 2886, 2899.

4. Inconsistencies with state statutory law do not give rise to a takings claim under the Fifth Amendment to the United States Constitution. *Moore v. City of Costa Mesa,* 886 F.2d 260, 264 (9th Cir. 1989).

ARGUMENT

I.

THIS COURT LACKS JURISDICTION BECAUSE DEL ORO DID NOT EXHAUST ITS STATE JUDICIAL REMEDIES

On September 28, 1990, Del Oro filed a first amendment to its complaint alleging a seventeenth cause of action for damages under 42 U.S.C. Section 1983 based on the Fifth Amendment to the United States Constitution[1]. Prior to trial, Del Oro abandoned its fifth cause of action for inverse condemnation under the California Constitution. A-12, fn. 15.

Since this Court's decision in *Williamson County*, it has been clear that private landowners may not pursue a "takings" claim under the Fifth Amendment unless they have exhausted available procedures for recovering "just compensation" in state courts. The rule has been applied without question in every circuit. *Gamble v. Eau Claire County*, 5 F.3d 285, 286 (7th Cir. 1993); *Gilbert v. City of Cambridge*, 932 F.2d 51, 63-65 (1st Cir. 1991); *Southern Pacific Transportation Co. v. City of Los Angeles*, 922 F.2d 498, 502-503 (9th Cir. 1990); *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1574-1575 (11th Cir. 1989); *Estate of Himelstein v. City*

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[1] This claim was barred by the one year statute of limitations when filed. *Azul Pacifico, Inc. v. City of Los Angeles*, 873 F.2d 704, 705 (9th Cir. 1992).

of Fort Wayne, 898 F.2d 573, 575-576 (7th Cir. 1990); *G.M. Engineers & Associates, Inc. v. West Bloomfield Township*, 922 F.2d 328, 331 (6th Cir. 1990); *Austin v. City and County of Honolulu*, 840 F.2d 678, 680-681 (9th Cir. 1988).

Since this Court's decision in *First English,* 482 U.S. 304, California courts have provided a constitutionally adequate damages remedy. *Schnuck v. City of Santa Monica*, 935 F.2d 171, 173 (9th Cir. 1991); *Sinaloa Lake Owners Assn. v. Simi Valley*, 882 F.2d 1398, 1403 (9th Cir. 1989); see *Healing v. California Coastal Commission,* 22 Cal.App.4th 1158, 1169, 27 Cal.Rptr.2d 758 (1994). Most recently the California Supreme Court in *Hensler v. City of Glendale*, 8 Cal.4th 1, 13, 32 Cal.Rptr.2d 244, 251-252 (1994), stated the rules:

> "The Fifth Amendment to the United States Constitution conditions the state's right to take private property for public use on the payment of 'just compensation.' It leaves to the state, however, the procedures by which compensation may be sought. 'If the government has provided an adequate process for obtaining compensation, and if resort to that process "yield[s] just compensation," then the property owner "has no claim against the Government" for a taking.' (*Williamson Planning Comm'n v. Hamilton Bank, supra,* 473 U.S. 172, 194-195, 105 S.Ct. 3108, 3121, 87 L.Ed.2d

126; see also *Preseault v. ICC* (1990) 494 U.S. 1, 11, 110 S.Ct. 914, 921, 108 L.Ed.2d 1.)

> "California provides such a process by making available an action for inverse condemnation if, after exhausting administrative remedies to free the property from the limits placed on development and obtaining a judicial determination that just compensation is due, any restrictions for which compensation must otherwise be paid are not lifted. In that action the court determines whether the restriction on development 'goes too far' and will be constitutionally impermissible unless just compensation is paid for the taking brought about by the restriction."

Because Del Oro failed to pursue its state law inverse condemnation remedy, this Court is without jurisdiction to entertain a takings claim.

II.

AN "AS APPLIED" TAKINGS CLAIM IS NOT RIPE BECAUSE DEL ORO DID NOT APPLY TO DEVELOP UNDER THE PROVISIONS OF THE ORDINANCE

The California courts correctly held that an "as applied" challenge is not ripe for judicial review. *Williamson County*, 473 U.S. 172, 199-200. Del Oro infor-

mally asked to be totally exempted from the ordinance based on a vested rights theory, but it did not apply to develop under either the exemptions to the ordinance or through implementing procedures of the ordinance. It is undisputed that the purchasers of Del Oro's property actually received permission to develop all of the 1,200 dwelling units contemplated by Del Oro's project within the time frame envisioned by Del Oro. The Court of Appeal correctly held that:

> ". . . Under the settled rules for property owners, it is evident that Del Oro has failed to perfect an 'as applied' challenge because it did not apply for permits or allocations to develop the property or seek a variance of some type, other than complete exemption. We are reluctant to create a new category of wholesaler of land or intermediary who is exempt from the requirement of exhaustion of administrative and judicial remedies, based solely on Del Oro's timing argument that it lost profits due to the growth control restrictions which allegedly impeded a timely sale of its property. . . ." A-23 through A-24.

Because Del Oro did not obtain a final decision regarding the application of the ordinance to its property, it is foreclosed from making an "as applied" takings claim.

III.

THE CALIFORNIA COURTS CORRECTLY HELD THAT THE ORDINANCE, ON ITS FACE, SATISFIES BOTH PRONGS OF THE *AGINS* TEST

A. Conflicts With State Statutory Law Do Not Establish That The Ordinance, On Its Face, Fails To Substantially Advance Any Legitimate Governmental Interest.

The California Court of Appeal correctly analyzed and rejected Del Oro's claim that it is entitled to at least nominal damages because the Court held the ordinance invalid as conflicting with state statutes and the City's general plan. The California Court explained:

> "Although we found in our BIA opinion that Prop. A could not stand because it was in conflict with the City's general plan and statutory provisions, we do not find that conclusion mandates a finding here that Prop. A also violates constitutional rights so as to constitute a per se taking of private property. Instead, we conclude that Del Oro has failed to show Prop. A promotes no legitimate state purpose and would thus be facially invalid under takings standards. . . ." A-2 through A-3.

> ". . . Del Oro claims it is entitled to at least nominal damages for a per se constitutional violation of its property rights. (*Memphis Community School Dist. v. Stachura* (1986) 477 U.S. 299, 308, fn. 11.) However, as we have suggested above, the statutory and other infirmities found in Prop. A do not convert it into an unconstitutional taking of property on the undisputed facts here. An invalid regulation is not necessarily an unconstitutional one. (*Moore v. City of Costa Mesa* (9th Cir. 1989) 886 F.2d 260. . . .)" A-28.

Inconsistencies with state statutory law do not rise to the level of an impermissible governmental purpose under the United States Constitution. Different standards are involved. *Moore*, 886 F.2d 260, 264 [". . . While the California courts determined that the conditional variance invaded Moore's property rights, this was not an 'invasion' of sufficient magnitude to have denied Moore the 'justice and fairness' guaranteed by the fifth and fourteenth amendments. . . ."]; see, also, *Bello v. Walker*, 840 F.2d 1124 (3d Cir. 1988).

Federal courts have often held that a local regulation which violates state planning laws, is not unconstitutional so long as the regulation advances some constitutionally permissible purpose. *Moore*, 886 F.2d 260, 264 [invalid conditional variance not a taking]; *Bello*, 840 F.2d 1124, 1126 [unlawful denial of a permit not a

taking]; *Chesterfield Development Corp. v. City of Chesterfield,* 963 F.2d 1102, 1103-1106 (8th Cir. 1992) [enactment of otherwise reasonable general plan and zoning regulations in violation of state law not a basis for substantive due process claim]; *Harding v. County of Door,* 870 F.2d 430, 431-432 (7th Cir. 1989), *cert. denied,* 110 S.Ct. 154 [substantive due process not violated even where plaintiff had been prevented from building by local actions expressly found unlawful by state court]; *Coniston Corp. v. Village of Hoffman Estates,* 844 F.2d 461, 467 (7th Cir. 1988) ["A violation of state law is not a denial of due process of law."]; *Chiplin Enterprises, Inc. v. City of Lebanon,* 712 F.2d 1524, 1527 (1st Cir. 1983) [violation of state law not equivalent to violation of constitutional rights]. In *Petaluma,* 522 F.2d 897, 905-908, the federal court expressly rejected a challenge to growth management regulations similar to the ordinance in this case despite allegations that the regulations did not satisfy a "regional welfare" standard and express findings that the regulations had a strong exclusionary effect.

B. The Ordinance Substantially Advances Legitimate Governmental Interests.

The purposes set forth in the ordinance (Appendix 1) are on their face legitimate. The voters stated their intent in the ordinance:

> "It is the intent of the people of the City to establish control over the quality,

> distribution, and rate of growth of the City in the interest of: Preserving the character of the community; Protecting the open space of the City; Protecting the quality of life in the City; Ensuring the adequacy of City facilities; school facilities, recreation and park facilities and services; Ensuring a balance of housing types and values in the City which will accommodate a variety of families including families of moderate income and older families on limited and/or fixed incomes; Ensuring the balanced development of the City; Preventing further significant deterioration in the local air quality; Ensuring that the traffic demands do not exceed the capacity of streets; Ensuring the character of the City's semi-rural or rustic neighborhoods is preserved; Ensuring that the City does not grow in a pattern that places a severe strain on the local freeway system; Ensuring the adequacy of fire protection; and Ensuring adequate water and sanitary sewer systems."

In this case the trial court held, after a lengthy evidentiary trial where the City carried a heavy statutory

burden of proof[2], that the ordinance was, in fact, necessary for the public health, safety or welfare because "the demonstrated unhealthy growth rate existing in Oceanside as of 1987 created 'real and substantial' problems which the City could reasonably anticipate to occur in the near future". Statement of Decision, August 6, 1991. The evidence admitted at trial shows that, when the citizens enacted the ordinance, the City's population was increasing at a far more rapid rate than the region. Twenty-five thousand dwelling units had tentative map or specific plan approvals with no time limit on when they could be built. This could translate into 60,000 new residents in a City with a population of 100,000. The pace of new development was causing severe deficiencies in public facilities and services resulting in traffic congestion, overcrowded schools, libraries and parks, police and fire service concerns, overflowing sewers, inadequate drainage facilities, and less than a 36 hour supply of water. The trial court found that the ordinance was necessary for the local health, safety and welfare because existing regula-

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[2] Evidence Code Section 669.5 provides, in part:

"(a) [Such an ordinance] is presumed to have an impact on the supply of residential units available in an area which includes territory outside the jurisdiction of the city, county, or city and county.

"(b) With respect to any action which challenges the validity of an ordinance specified in subdivision (a) the city, county, or city and county enacting the ordinance shall bear the burden of proof that the ordinance is necessary for the protection of the public health, safety, or welfare of the population of the city, county, or city and county."

tions did not give the City the power to regulate the timing of development. The purposes of the ordinance are proper under state and federal law and supported by substantial evidence in the record.

This Court and lower federal courts have often held that growth management purposes like those set forth in the ordinance are constitutional. See, *e.g.*, *Agins*, 447 U.S. 255, 261 [ordinance "discouraging premature and unnecessary conversion of open-space lands to urban uses"]; *Belle Terre*, 416 U.S. 1, 9; *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1236 (9th Cir. 1994) [preserving "small town" character, providing range of housing types and limiting development consistent with local resources]; *Petaluma*, 522 F.2d 897, 905-908 [upholding growth control regulations].

California courts have repeatedly held that such purposes serve valid local interests. In *Long Beach Equities v. County of Ventura (City of Simi Valley)*, 231 Cal.App.3d 1016, 1030, 282 Cal.Rptr. 877 (1991), *cert. den.* (1992), for example, the court summarized:

> "City enacted its [growth management] ordinance 'to protect the unique, hill-surrounded environment; enhance the quality of life; promote public health, safety or welfare and the general well-being of the community. . . .' By limiting the rate, distribution, quality and type of residential development on an annual basis, with periodic reviews of the ongoing situa-

> tion, City seeks 'to improve local air quality, reduce traffic demands . . . and ensure that future demands for such essential services as water, sewers and the like are met. . . .'
>
> "Courts have long recognized the legitimacy of such ordinances, because such laws are designed to protect the public weal. [Citing cases.]. . ."

Recently, in *DeVita*, 9 Cal.4th 763, 791, the California Supreme Court observed:

> "General plan amendments such as Napa County's Measure J are one response to what some localities view as unwelcome development pressures. (See, Glickfeld, Local Initiatives in the 90s, *supra*, 1 Land Use Forum at pp. 99-100.) The purpose of the initiative, as articulated in an amicus brief by the cities of Napa County (the Cities) in support of the County, is to protect agricultural land from the encroachment of suburban development. The phenomenon of sprawling development has been identified as a serious land use problem in this state. (See, e.g., Bank of America et al., Beyond Sprawl: New Patterns of Growth to Fit the New California (1995) [report examining the increasing economic and environmental costs of suburban

> sprawl and calling for fundamental changes in state growth patterns]; *Sierra Club v. City of Hayward* (1981) 28 Cal.3d 840, 850 [171 Cal.Rptr. 619]. . . ."

The California Court of Appeal in this case correctly recognized that conflicts with state statutory law do not make the ordinance unconstitutional

C. Compensation Is Not Required Where The Property Is Not Deprived Of Substantially All Reasonable Use And Retained Substantial Value.

Del Oro contends that every regulation that is technically invalid under state statutory law automatically amounts to a violation of the Fifth Amendment to the United States Constitution even where the landowner was not deprived of "just compensation". Del Oro does not contend that it suffered an illegal exaction (*cf. Dolan v. City of Tigard*,___ U.S. ___, 114 S.Ct. 2309; *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)) or a physical occupation of its property (*cf. Kirby Forest Industries v. United States*, 467 U.S. 1, 5 (1984)) or was deprived of all beneficial use of its land (*cf. First English*, 482 U.S. 304; *Lucas*, 505 U.S. ___, 112 S.Ct. 2886) or any distinct property right (*cf. Hodel v. Irving*, 481 U.S. 704 (1987) [right to bequeath property].)

> The Fifth Amendment "does not prohibit the taking of private property, but instead places a condition on the exercise

> of that power. [Citations.] This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights, *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English*, 482 U.S. 304, 314-315.

The California Court of Appeal correctly recognized that:

> ". . . Prop. A does not affect the nature of the use of Del Oro's property, as Del Oro admits that its property remains zoned and specifically planned as it was in 1986, before Prop. A was introduced. . . .
>
> "* * *
>
> ". . . Del Oro does not dispute that it sold all its property within its own time frame and it or its buyers received permits to develop all the property for residential use within five years of the 1987 adoption of Prop. A. Del Oro's damages claims are thus based upon its lost profits, which it blames on Prop. A's interference with its projected timing of its land development deals. . . ." A-25 through A-26.

Del Oro posits the dangerous theory that it is entitled to damages for fluctuations in the real estate market, which Del Oro attributes to the campaign for the

ordinance, not the application of the ordinance to Del Oro's land. Del Oro claims that, when the ordinance was proposed by the voters, from that point on, it became practically impossible to market its property and claims damages for lost profits. The record shows that, in fact, all Del Oro's property was sold within Del Oro's two year time frame and the principals in the Del Oro enterprise actually profited handsomely.

It is well established that "just compensation" does not include compensation for lost profit expectations *(cf. Andrus*, 444 U.S. 51, 66) and that "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership'". *First English*, 482 U.S. 304, 320. No compensation is due until a taking actually occurs. *Ibid.*; see, also, *Danforth v. United States*, 308 U.S. 271, 278 (1939).

This Court has ruled that the abrogation of the right to sell property is not a taking. *Andrus*, 444 U.S. 51, 64. Here, Del Oro was not prevented from selling; Del Oro only claims it might have profited more from its sales without the "psychological" impacts of the ordinance on the market. The Fifth Amendment does not provide a remedy for every perceived business loss. Anticipated profits are entirely too speculative to form a basis for damages for inverse condemnation.

> "[The] [p]rediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. . . ." *MacLeod v. Santa Clara*

County, supra, 749 F.2d at p. 548, quoting *Andrus v. Allard*, 444 U.S. 51, 66 (1979).

In the context of a regulatory taking, claims of lost profits as a basis for damages have been soundly rejected by federal courts. *Ibid.;* see, also, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), and *Hodel*, 481 U.S. 704. Even in direct condemnation cases the "developer's approach" to valuation is too speculative to be admissible as an element of value. In *Contra Costa Water District v. Bar-C Prop.*, 5 Cal.App.4th 655, 658, 7 Cal.Rptr.2d 91 (1992), the court explained:

> ". . . Stated another way 'evidence of value in terms of the money which the land would bring for a specific purpose or as a result of a projected specific plan of development is not admissible as an element in determining such market value.' [Citations omitted.]
>
> "The rationale for this rule is that the expenses of completing the subdivision, improving the land, laying out streets, holding it and paying out taxes and interest until the lots are sold are far too uncertain and conjectural to allow finished subdivided lot prices to be used as a basis for computing value. (See 4 Nichols, Eminent Domain (3d ed. 1992 supp.), § 12B.14.) As one court put it '[s]uch evidence opens wide the door to unlimited vagaries and

> speculations concerning problematical prices which might under possible contingencies be paid for the land. . . .'"

Del Oro's speculation that it might have sold its property for more money if the ordinance had not qualified for the ballot is not an element of just compensation.

The California Court's opinion is consistent with the Ninth Circuit's analysis in a recent flooding case where the plaintiffs contended that they were entitled to compensation before their property was damaged. In rejecting the claim, the federal court of appeals observed "'[t]he Constitution . . . does not require a state to provide . . . pretaking compensation'." *Halverson v. Skagit County*, 42 F.3d 1257, 1262 (9th Cir. 1994). In other words, just compensation is not due until a protected property interest has been taken. Del Oro was not deprived of any protected property interest by the Ordinance. The Constitution does not protect Del Oro's desire to sell its property for a greater profit.

CONCLUSION

This case raises no special and important reason for Supreme Court review. The petition for certiorari should be denied.

Respectfully submitted,

KATHERINE E. (WATSON) STONE
MYERS, WIDDERS, GIBSON & LONG

Counsel of Record for Respondent

APPENDIX

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Counsel of Record for Respondent

APPENDIX

APPENDIX 1

PROPOSITION A
ORDINANCE NO. _____

AN ORDINANCE SUBMITTED BY INITIATIVE PETITION TO THE VOTERS AT THE APRIL 21, 1987, SPECIAL ELECTION RELATING TO RESIDENTIAL DEVELOPMENT CONTROL

The people of the City of Oceanside do ordain and hereby add Chapter 32A to the Oceanside Municipal Code as follows:

Chapter 32A. RESIDENTIAL DEVELOPMENT CONTROL

Sections:

32A.1	Findings
32A.2	Applicability of the Development Control System
32A.3	Establishment of Residential Development Evaluation Board
32A.4	Establishment of Annual Residential Development Allotments
32A.5	Development Allotment Application
32A.6	Development Allotment Evaluation
32A.7	Development Allotment Awards
32A.8	Additional Regulations
32A.9	Judicial Review
32A.10	Legal Challenges

32A.11 Modifications
32A.12 Severability
32A.13 Effective Date

Section 32A.1 Findings.

The people of the City of Oceanside, hereinafter called "City", hereby find and declare as follows:

(a) The City has adopted a General Plan and City Ordinances relating to the regulation of residential development.

(b) The City is experiencing a period of intense residential development which is adversely affecting the health, safety, and welfare of the citizens of Oceanside. This intense development has affected the capacity of the streets and local freeway system to satisfactorily meet traffic demands; the capacity of appropriate schools to absorb children without expensive bussing; the character of some of the neighborhoods of the community which have been identified as semi-rural, rustic, or agricultural in nature; the quality of life prevalent in the City and its sphere of influence; and the cost to households of some utilities and municipal services.

(c) It is the intent of the people of the City to achieve a steady, rather than a fluctuating, overly rapid, rate of residential growth each year in order that the services provided by City, School, Park, utility and/or

service agencies operating in the City can be properly and effectively staged in a manner which will not overextend existing facilities, and in order that deficient services may be brought up to required and necessary standards while minimizing, by means of long-range planning, the avoidable costs of shortsighted facility expansion. In order to accomplish this, fees collected for drainage, schools, streets, utilities, parks and recreation facilities shall be utilized in a timely manner to insure that new residents who pay impact fees will benefit directly from those facilities that are built within a reasonable time after they move in.

(d) It is the intent of the people of the City to establish control over the quality, distribution, and rate of growth of the City in the interest of: Preserving the character of the community; Protecting the open space of the City; Protecting the quality of life in the City; Ensuring the adequacy of City facilities, school facilities, recreation and park facilities and services; Ensuring a balance of housing types and values in the City which will accommodate a variety of families including families of moderate income and older families on limited and/or fixed incomes; Ensuring the balanced development of the City; Preventing

further significant deterioration in the local air quality; Ensuring that the traffic demands do not exceed the capacity of streets; Ensuring the character of the City's semi-rural or rustic neighborhoods is preserved; Ensuring that the City does not grow in a pattern that places a severe strain on the local freeway system; Ensuring the adequacy of fire protection; and Ensuring adequate water and sanitary sewer systems.

(e) It is the purpose of this ordinance to augment the policies of the City as recorded in the General Plan and City ordinances relating to the regulation of residential development; and

(f) In order to accomplish this purpose, the City must be able to control the rate, distribution, quality and economic level of proposed development on a year to year basis. To this end the following Residential Development Control System, hereinafter called "RDCS", for the City shall be in effect from and after its effective date until December 31, 1999.

Section 32A.2 Applicability of the Development Control System.

The provisions of the RDCS shall apply from the effective date to all residential development, including mobile homes, in the City of Oceanside with the exception of the following:

(a) Projects of not more than four residential dwellings, limited to only one such project per developer per calendar year.

(b) Fourplexes or less numbered multiple dwellings on a single existing lot.

(c) Single family residential units on a single existing lot.

(d) Rehabilitation or remodeling of an existing dwelling, or conversion of apartments to condominiums, so long as no additional dwelling units are created.

(e) Units within the legally designated redevelopment project area.

(f) Those specific Units which are formally dedicated for occupancy by low- income persons or senior citizens pursuant to the provisions of applicable federal, state, or local laws or programs provided these types of units are spread equitably throughout the city and not concentrated in one neighborhood. For the purposes of this section, a project is funded or subsidized pursuant to applicable federal, state or local laws or programs if it receives a loan, grant or continuing financial subsidy for the purpose of developing low-income or senior citizen housing units. This section does not exempt low-income or senior citizen projects built with density bonuses

or other development considerations under any program.

(g) Single family dwelling unit projects with lots an average of which are 10,000 square feet or better, which can achieve a minimum of 70% or better, of the maximum awardable points using the Residential Development Evaluation System are exempt.

Section 32A.3 Establishment of Residential Development Evaluation Board.

In order to administer the system set forth herein, and especially to make the valuations set forth in Section 32A.6 below, a Residential Development Evaluation Board (hereinafter called the Board) is hereby established, consisting of the duly appointed members of the Planning Commission of the City.

The procedures and bylaws of the Board shall be developed by the Board subject to the approval of the City Council of Oceanside (hereinafter called the City Council). The Planning Department of the City of Oceanside shall serve as the staff of the Board.

Section 32A.4 Establishment of Annual Residential Development Allotments.

The number of dwelling units hereinafter to be constructed each year in the City (except for dwelling units exempted in accordance with the provisions of section 32A.2 shall be as follows:

(a) Calendar year 1987: A maximum of 1000 units; and

(b) Calendar year 1988 and all years thereafter through December 31, 1999: a maximum of 800 dwelling units.

The annual allotment may be modified by the City Council to an amount not greater than 10% more or less for any given year, provided that the annual allotment for the next succeeding year shall be set higher or lower, as the case may be, in order to redress any excess or deficit. The annual allotment shall be continuously applicable to the City's jurisdictional boundaries and shall not be modified by reason of annexation or additional territory. This allotment shall conform to the Public Facilities Management Element Projected Growth as established by Resolution Number 79-27 of the City Council of Oceanside.

Section 32A.5 Development Allotment Application.

No building permit of nonexempted projects may be issued unless a development allotment for such project has been granted. At the time prior to obtaining a building permit, the developer of proposed projects not exempted from application for a development allotment pursuant to the provisions of Section 32A.2 shall apply for a development allotment as set forth herein.

Section 32A.6 Development Allocation Evaluation.

The Board shall consider all applications properly submitted and shall make recommendations to the City Council based on the criteria set forth below:

(a) Availability of Public Facilities and Services. The Board shall examine each application for its relations to, or impact upon, local public facilities and services, and shall rate each development by assignment of from zero to ten points (zero indicating "very poor" and ten indicating "excellent") on each of the following attributes:

(i) The capacity of the water system to provide for the needs of the proposed development without system expansions or extensions beyond those normally installed by the developer.

(ii) The capacity of the sanitary sewers to dispose of the wastes of the proposed development without system expansions or extensions beyond those normally installed by the developer.

(iii) The capacity of the drainage facilities to adequately dispose of the surface runoff of the proposed development without system extension beyond those normally installed by the developer.

(iv) The ability of the fire department to provide fire protection according to the established response standards of the City without the necessity of establishing a new station or requiring addition of major equipment or housing facilities to an existing station.

(v) The capacity of the appropriate school to absorb the children expected to inhabit a proposed development without necessitating or adding to double sessions or other unusual scheduling or classroom overcrowding or adding to expensive school bussing.

(vi) The capacity of major street linkage to provide for the needs of the proposed development without substantially altering existing traffic patterns or overloading the existing street system, and the availability of other public facilities (such as parks, playgrounds, etc.) to meet the additional demands for vital public services without extension of services beyond those provided by the developer.

(vii) The capacity of Highway 76 within the city limits to provide for the needs of the proposed development.

(b) The Board shall examine each application which has not been withdrawn by the applicant for failure to meet subsection (a), and shall rate each development by the assignment of from zero to ten points (zero indicating "very poor", ten indicating "excellent") on each of the following attributes:

(i) Site and architectural design quality which may be indicated by the harmony of the proposed buildings in terms of size, height, color and location with existing neighboring development.

(ii) The amount and character of open space and slope landscaping.

(iii) Site and architectural design quality which may be indicated by the arrangement of the site for efficiency of circulation, on and off site traffic safety, privacy, etc.

(iv) The provision of public and/or private usable open space.

(v) Contributions to and extensions of existing system of foot or bicycle

paths, equestrian trails and facilities and/or greenbelts.

(vi) The provision of needed public facilities such as critical linkages in the major street system, school rooms, functional parks, or other vital public facilities.

(vii) Site and architectural design quality which may be indicated by the amount and character of modification of the topography, including quantity of grading, extent of natural slopes cut and/or filled and impact on ridgelines.

(viii) Absence of deleterious impact on trees and archaeological sites.

(ix) The provision of energy generation and conservation features.

(x) The provision of energy generation and conservation features, such as additional insulation, house siting and design, solar techniques and other innovative techniques.

(xi) Absence of deleterious impact on the physical and/or aesthetical environment.

(c) After having studied each application in accordance with subsections (a) and (b), in regard to each of the criteria, and having

assigned evaluation points on a scale of 0 to 10 in accordance with their findings, the Board shall prepare two lists, one documenting points awarded from subsection (a) and the other from subsection (b), arranging the greatest total number of evaluation points to that receiving the lowest number. In addition to listing the number of actual points awarded in each subcategory of both parts, each part will be totaled and the total shall then be expressed as a percentage of the maximum number of points awardable. The maximum number of points awardable shall not include those elements of the criteria found to not be applicable.

Section 32A.7 Development Allotment Awards.

(a) The City Council shall consider at a public hearing, the recommendations and rankings of the proposed developments on each of the above described two lists, along with any action taken by the Board concerning appealed decisions, and shall compile one list ranking each of the proposed developments, and shall award from that list development allotments.

(b) Minimum point requirements. The City Council shall eliminate from consideration any development which has not been assigned a minimum of 51 percentage points

under Section 32A.6, subparagraph (a) herein, or a minimum of 70 percentage points under Section 32A.6, subparagraph (b). If in any given year the highest ranking development does not at least meet both of the minimum point requirements, the City Council shall make no Development Allotment for that year. The number of units will then be added, as the only allowed exception to the 10 percent rule in Section 32A.4 to the allotment for the ensuing year.

(c) Should a developer fail to initiate construction within twenty four months after award of the Development Allotment, the City Council, after a hearing must rescind all or part of the Development Allotment.

(d) The City Council shall develop such policies and ordinances as necessary to implement the Ordinance within 30 days of passage.

Section 32A.8 Additional Regulations.

Should the arrangement of projects as provided in Section 32A.7, subparagraph (a), produce the situation in which two projects have equal evaluation scores, but only one project can be permitted within the quota, the City Council may offer those applications a pro rata share of the number of units available within the quota, or may dispose of such a tie in any other manner deemed equitable by the City.

Section 32A.9 Judicial Review.

Any legal action to challenge a decision or denial of the Board, or any other government body performing a function under this ordinance, must be filed in a court of competent jurisdiction within thirty days immediately following the action challenged.

Section 32A.10 Legal Challenges.

Any legal action to challenge any provision of this ordinance or to challenge the intent of this ordinance, must be vigorously defended by the City.

Section 32A.11 Modification.

The City Council may, after a public hearing, by a unanimous vote, change any part of this RDCS by amendment, providing the amendment is consistent with the intent of this ordinance.

Section 32A.12 Severability.

If any provision of this ordinance, or the application thereof, to any person or circumstance is held invalid by a court of competent jurisdiction, the validity of the remainder of this ordinance and the application of such provisions to other persons or circumstances shall not be affected thereby.

Section 32A.13 Effective Date.

This RDCS shall be considered as adopted upon the date that the vote is certified by the City Clerk, and shall go into effect immediately thereafter.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 9105 Sunset Boulevard, West Hollywood, California 90069; that on July 25, 1995, I served the within *Opposition To Petition For Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(Original and 40 Copies)

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Pacific Legal Foundation and
People for Affordable Housing

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 25, 1995, Los Angeles, California.

Betty J. Malloy
(*Original Signed*)